Supreme Court, U. S.
FILED
NOV 15 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-720

LEE WAY MOTOR FREIGHT, INC.,
Petitioner,

vs.

PATRICK RESENDIS, TONY ESCOBEDO AND ELIAS GONZALEZ,
Respondents,

and

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

vs.

ERNEST HERRERA, TRINE URIBE AND MARIO MELCHOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Opinions Below 2

Jurisdiction 3

Questions Presented 4

Statement of the Case—

Lee Way Motor Freight, Inc., Petitioner v. Patrick Resendis, Tony Escobedo and Elias Gonzales, Respondents 6

Yellow Freight System, Inc., Petitioner v. Ernest Herrera, Trine Uribe and Mario Melchor, Respondents 11

Reasons for Granting the Writ—

1. The Decisions of the Court of Appeals in the Instant Cases Conflict With the Decisions of the United States Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792 and Edwin L. Wiegand Company v. Jurinko, 414 U.S. 970 14

2. The Decisions of the Fifth Circuit Fail to Follow the Controlling Decision of This Court in McDonnell Douglas v. Green, Supra and Conflict With the Decision of the Sixth Circuit in EEOC v. Detroit Edison, Supra, Because They Do Not Require That Plaintiffs Prove They Were Harmed by Some Initial Act or Practice of Employment Discrimination Which Was Perpetuated by the Existence of Separate Bargaining Units or a No-Transfer Rule 20

3. The Decisions of the Fifth Circuit Court of Appeals Are in Conflict With McDonnell Douglas, Supra and Griggs v. Duke Power Co., 401 U.S.

424, Because by Stipulation and Uncontroverted Evidence the Plaintiffs Were Not Physically Qualified for Road Driving 25

4. The Fifth Circuit's "Qualification Date" Formula Conflicts With the Measure of Proof Established by the Sixth Circuit in Thornton v. East Texas Motor Freight, Supra, With Respect to Eligibility for Back Pay and Back Seniority 32

Conclusion 34

Appendix A—Opinion of the United States District Court for the Western District of Texas in *Resendis, et al.* v. *Lee Way Motor Freight, Inc.* A1

Appendix B—Opinion of the United States Court of Appeals for the Fifth Circuit in *Resendis, et al.* v. *Lee Way Motor Freight, Inc.* A10

Appendix C—Opinion of the United States District Court for the Western District of Texas in *Herrera, et al.* v. *Yellow Freight System, Inc.* A16

Appendix D—Opinion of the United States Court of Appeals for the Fifth Circuit in *Herrera, et al.* v. *Yellow Freight System, Inc.* A23

Appendix E—Opinion of the United States District Court for the Western District of Texas in *Rodriguez* v. *East Texas Motor Freight* A27

Appendix F—Opinion of the United States Court of Appeals for the Fifth Circuit in *Rodriguez* v. *East Texas Motor Freight* A40

Appendix G—Resendis Motion for Rehearing Denied .. A88

Appendix H—Herrera Motion for Rehearing Denied A90

Appendix I—Rodriguez Motion for Rehearing Denied .. A92

Table of Authorities

CASES

Equal Employment Opportunity Commission v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975) 4-5, 20, 23

Furniture Forwarders of St. Louis v. *Chicago, Rock Island & Pacific Railroad Company*, 393 F.2d 537 (8th Cir. 1968) 22

Gambill v. *United States*, 276 F.2d 180 (6th Cir. 1960) 22

Gilmore v. *Kansas City Terminal Railway Company*, 509 F.2d 48 (8th Cir. 1975) 19

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 5, 20, 25, 26, 29, 31

Herrera, et al. v. *Yellow Freight System, Inc.*, 6 F.E.P. 42 (U.S. D.C. W.D. Tex.) 2

Herrera, et al. v. *Yellow Freight System, Inc.*, 505 F.2d 66 (5th Cir. 1974) 2, 6, 16, 17, 18, 20, 21, 31

Jones v. *Lee Way*, 431 F.2d 245 (10th Cir., 1970, cert. denied March, 1971) 9, 21

King v. *Yellow Freight System, Inc.*, 10 EPD ¶10,411 (8th Cir.) 18

Laugesen v. *Anaconda Company*, 510 F.2d 307 (6th Cir. 1975) 20

Mayor v. *Educational Equality League*, 415 U.S. 605 28

McDonnell Douglas v. *Green*, 411 U.S. 792 (1973) 4, 5, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 28, 29, 31, 33

Peltier v. *City of Fargo*, 396 F.Supp. 710 (D.C. S.E. Div., N D., 1975) 19

Randall Foundation v. *Riddell*, 244 F.2d 803 (9th Cir. 1957) 22

Resendis, et al. v. *Lee Way Motor Freight, Inc.*, 6 F.E.P. 38 (U.S. D.C. W.D. Tex.) 2

Resendis, et al. v. *Lee Way Motor Freight, Inc.*, 505 F.2d 69 (5th Cir. 1974) 2, 11, 13, 16, 17, 18, 20, 21
Rice v. *The Gates Rubber Company*, 521 F.2d 782 (6th Cir. 1975) 19
Rodriguez v. *East Texas Motor Freight*, 6 F.E.P. 45 (U.S. D.C. W.D. Tex.) 2
Rodriguez v. *East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974) 2, 6, 13, 16, 17, 18, 31, 32, 33
Rogers v. *International Paper Company*, 510 F.2d 1340 (8th Cir. 1975) 19
Thornton v. *East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974) 5, 24, 32
Wiegand Company v. *Jurinko*, 477 F.2d 1038 (3rd Cir. 1973) 18, 20
Wiegand v. *Jurinko*, 414 U.S. 970 18

STATUTES

Civil Rights Act of 1964, Title 42 U.S.C. Section 2000e-5 3
Title VII, Section 703(a), 42 U.S.C. 2000e-5(f) 4, 5, 6, 14, 15, 20
Section 8, Interstate Commerce Act, Part II: Motor Carriers, Title 49 U.S.C. Section 301 effective October 1, 1935 (Section 327) 27
28 U.S.C. Section 1254 3
28 U.S.C. Section 1343(4) 3
42 U.S.C. Section 1981 .....3, 4, 5, 6, 14, 20

REGULATIONS

Department of Transportation Motor Carrier Safety Regulations, Part 391, June, 1972 27
ICC Revised Safety Regulations, 1965, No. 191.12, *et seq.* 28

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Lee Way Motor Freight, Inc. and Yellow Freight System, Inc. pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the judgment of said Court of Appeals in each of the above cases filed on November 24, 1974.

Timely motions for rehearing and for transfer to and rehearing *en banc* were filed and were denied on August 18, 1975.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas in *Resendis, et al.* v. *Lee Way Motor Freight, Inc.* is reported at 6 F.E.P. 38. A copy thereof is set out herein as Appendix A.

The opinion of the United States Court of Appeals for the Fifth Circuit in *Resendis, et al.* v. *Lee Way Motor Freight, Inc.* is reported in 505 F.2d 69 (1974) and is set out herein as Appendix B.

The opinion of the United States District Court for the Western District of Texas in *Herrera, et al.* v. *Yellow Freight System, Inc.* is reported at 6 F.E.P. 42. A copy thereof is set out herein as Appendix C.

The opinion of the United States Court of Appeals for the Fifth Circuit in *Herrera, et al.* v. *Yellow Freight System, Inc.* is reported in 505 F.2d 66 (1974). Copy thereof is set out herein as Appendix D.

The opinion of the United States District Court for the Western District of Texas in *Rodriguez* v. *East Texas Motor Freight*, a case tried immediately before the above *Lee Way* and *Yellow Freight* cases, is reported at 6 F.E.P. 45. A copy is set out herein as Appendix E.

The opinion of the United States Court of Appeals for the Fifth Circuit in *Rodriguez* v. *East Texas Motor Freight* is reported in 505 F.2d 40 (1974). A copy is set out herein as Appendix F.

Timely motions for rehearing and for transfer to and rehearing *en banc* were filed and were denied August 18, 1975. Copies thereof are set out herein as Appendices G, H and I.

JURISDICTION

Jurisdiction in the United States District Court was based on the Civil Rights Act of 1964, Title 42 U.S.C. Section 2000e-5:

> "(e) If . . . the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge. . .
>
> "(f) Each United States district court . . . shall have jurisdiction of actions brought under this subchapter."

and Title 28 U.S.C. Section 1343(4), which in pertinent part states:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> "(4) To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights. . ."

and Title 42 U.S.C. Section 1981, which states:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, . . ."

Jurisdiction in this Court is conferred by Title 28 U.S.C. Section 1254, which states:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after the rendition of judgment or decree."

QUESTIONS PRESENTED

1. Did the Fifth Circuit Court of Appeals fail to follow the controlling decision of this Court in *McDonnell Douglas* v. *Green*, 411 U.S. 792 in two separate private actions brought by individuals under Section 703(a) of Title VII, 42 U.S.C. 2000e-5(f) and 42 U.S.C. 1981 where no classwide relief was requested, but only relief for the individual plaintiffs in the form of transfer with full seniority and back pay, when it held that:

(a) statistics alone are sufficient to make a prima facie case and to entitle the plaintiff to the relief requested, and

(b) the plaintiffs did not have the burden of proving that (i) they applied for a job as a road driver at a time when the employer was hiring road drivers, or (ii) they were qualified for the job of road driver. and

(c) class action principles concerning the burden of proof in Title VII litigation apply to a private action by individuals who seek no classwide relief.

2. Did the Fifth Circuit Court of Appeals render a decision which conflicts with the decision of this Court in *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973) and the decision of the Sixth Circuit in *Equal Employment Opportunity Commission* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), when it ruled that the existence of separate bargaining unit seniority systems for city drivers and road drivers employed by a motor freight carrier and the existence of a company rule prohibiting transfer from one job to the other violates Title VII of the Civil Rights Act of 1964 or 42 U.S.C. 1981: (1) where the employees claiming the right to transfer to a road driving job with back pay and accumulated seniority stipulate there was no discrimination in their original employment as defined by Title VII; and (2) where there is no pleading or proof that those employees had initially applied for jobs as road drivers or were deterred from applying because of the employer's reputation for discriminatory hiring practices at a time when the company was hiring road drivers with equivalent or lesser qualifications.

3. Did the Fifth Circuit Court of Appeals fail to follow the controlling decision of this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 and *McDonnell Douglas* v. *Green*, 411 U.S. 792 when it held that the plaintiffs were entitled to relief under Section 703(a) of Title VII and 42 U.S.C. 1981 despite the fact that the plaintiffs could not meet the employer's physical qualifications for road drivers, which qualifications were stipulated by the parties to be non-discriminatory and found to be so by the District Court.

4. Whether there is a conflict between the opinion of the Fifth Circuit Court of Appeals in these cases and the Sixth Circuit Court of Appeals in *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416 relative to seniority relief and back pay which should be granted a successful Title VII litigant involving the same industry, the same labor contract and identical claims of racial discrimination.

STATEMENT OF THE CASE

Lee Way Motor Freight, Inc., Petitioner v. Patrick Resendis, Tony Escobedo and Elias Gonzalez, Respondents

This is an action brought by four Mexican-Americans, Patrick Resendis, Tony Escobedo, Elias Gonzalez and Arturo Rodriguez, and one Black American, Wilburn White, against Lee Way Motor Freight, an interstate common carrier, and Teamsters Local Union 657, alleging violations of Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. §2000e-5(f), as well as violations of 42 U.S.C. §1981. It is reported at 5[illegible] F.2d 69.

The case was tried before the United States District Court for the Western District of Texas in tandem with two other trucking cases, *Herrera* v. *Yellow Freight*, 505 F.2d 66, and *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40. The three cases were argued at the same time on appeal before the Fifth Circuit Court of Appeals and petitions for a writ of certiorari to the United States Supreme Court are pending in all three cases.

The District Court denied relief to all five plaintiffs. The Fifth Circuit Court of Appeals affirmed as to Rodriguez and White, but reversed and remanded as to Resendis, Escobedo and Gonzalez.

The three remaining plaintiffs are employed by Lee Way as city pick up and delivery drivers and are members of Teamsters Local Union 657.

References to the printed records in the Circuit Court, which consisted of one volume in each case, will be made by the names "Herrera" and "Resendis" followed by the page number. References to the Record on Appeal will

be made by the letters "RA" followed by the page number. References to the appendix to this petition will be indicated by the letter "A" followed by the page number.

Gonzalez was hired by Lee Way as a city driver in San Antonio, Texas on April 8, 1950, as was Resendis on May 1, 1963 (Resendis-30, 42). Escobedo was hired as a city driver in San Antonio by Alamo Freight Lines on June 26, 1951 (Resendis-11). Alamo was subsequently acquired by Texas-Arizona Motor Freight, and the latter was acquired by Lee Way in 1966 (Rosendis-14).

Prior to the acquisition of Texas-Arizona in 1966, Lee Way did not employ any over-the-road truck drivers in San Antonio (Resendis-208, 230). Upon the acquisition, there were 26 road drivers employed by Texas-Arizona in San Antonio, who became employees of Lee Way. All 26 were white (A-12).

In 1967 Lee Way hired one additional road driver in San Antonio who was Mexican-American (Resendis-157). In 1968 Lee Way hired four more road drivers, all of whom were white (Resendis-157). There were no further road drivers hired in San Antonio until after this suit was filed (Resendis-157, 158).

At the onset of the trial before the District Court, the parties stipulated that (1) the plaintiffs were not discriminated against as defined by Title VII of the Civil Rights Act of 1964 insofar as their original employment is concerned; (2) the sole claim of discrimination was based on the fact that after their original employment they were "locked in" to the lower paying job of city driver and denied a job as a road driver because of the maintenance of separate seniority rosters for city and road drivers and a loss of seniority upon transfer from one job to the other; (3) that no one, regardless of race, had ever been permit-

ted to transfer from a city job to a road job and carry with him his city seniority for bidding and lay-off purposes; (4) that Lee Way's qualifications for line driving jobs were valid and not discriminatory (Resendis-3-6).

Among Lee Way's qualifications for road drivers were a 225 pound weight maximum and a 5'7" minimum height standard (Resendis-170). The weight maximum was established because of the confined nature of the sleeper bunk in the rear of the cab (Resendis-170). The minimum height standard was established to accommodate the required leg length to reach the pedals on the floor of the tractor, as well as see over the top of the steering wheel (Resendis-170). Road drivers were also required to pass a physical examination required by the Department of Transportation rules and regulations (Herrera-Exhibit T, Herrera-244, Resendis-114).

The plaintiff Elias Gonzalez was 5'5" tall (Gonzalez Deposition-20). The plaintiff Tony Escobedo weighed over 300 pounds (Resendis-22).

Plaintiffs Gonzalez and Resendis admitted that when they were employed by Lee Way in 1950 and 1963, respectively, they applied for a truck driving job at Lee Way in San Antonio and received the best and highest paying truck driving job available at that terminal (Resendis-34, 48).

There was no allegation or proof that the plaintiffs had originally applied for employment as road drivers or had been deterred from applying because of the employer's reputation for discriminatory hiring practices at a time when the company was hiring road drivers.

The three plaintiffs testified that they were not aware of a single Mexican-American who had applied for a road

job and been turned down (Resendis-36, 58, 59; Escobedo Deposition-20, 21).

Prior to July, 1971, Lee Way had a no-transfer policy which prohibited transfers from city to road jobs (Resendis-208). This policy was abandoned after the Supreme Court denied certiorari in *Jones* v. *Lee Way,* 431 F.2d 245 (10th Cir., 1970, cert. denied March, 1971), which held the no-transfer policy to be unlawful under Title VII (Resendis-208, 209).

In July, 1971, a bulletin was posted in the San Antonio terminal advising employees of the abandonment of the no-transfer rule and instructing them on how to apply for a road job. Under these instructions, a request to transfer was to be initiated by a written application (Resendis-220, Resendis-Exhibit G).

In February, 1972 a second bulletin was posted in the San Antonio terminal advising employees that Lee Way intended to commence hiring road drivers in Oklahoma City, Oklahoma, where over 90% of Lee Way's road drivers were domiciled (Resendis-110-111, 161). The bulletin invited all employees who were qualified to contact the terminal manager and submit a written application if they were interested in transferring (Resendis-111).

Lee Way hired in excess of 100 new road drivers a year at its principal road terminal at Oklahoma City, Oklahoma (Resendis-161). None of the plaintiffs ever asked to transfer to a road job because they did not want to lose their city seniority (Resendis-18-20, 32, 53; Escobedo Deposition-20, 24). Also, Resendis and Gonzalez were not interested in a job outside of San Antonio (Resendis-32, 53-54; Gonzalez Deposition-22).

On March 4, 1973 a road driver position opened at Lee Way in San Antonio and the position was given to the

plaintiff Resendis with the understanding that he would have 30 days to come back to his city driver position if he found out he didn't like road driving (RA-63-64). Resendis took seven trips during the first twelve days of his employment as a road driver and then requested that he be allowed to return to his city driving job because he couldn't take the physical stress of road driving and his doctor had informed him that unless he wanted to have an ulcer and continued stomach trouble, he should quit the road job (RA-63-64). He then returned to his city driving job with full seniority (RA-63-64).

The District Court found that none of the plaintiffs had applied for or were qualified to be over-the-road drivers, and denied relief (A-5, 7).

The Court of Appeals held that the statistical imbalance between the percentage of Lee Way's road drivers in San Antonio who were Mexican-American (1 out of 30) and the percentage of city drivers in San Antonio who were Mexican-American (26 out of 44) established a prima facie case of discrimination in the past hiring of road drivers, and that this discrimination was perpetuated by the no-transfer policy and by the maintenance of separate seniority rosters for city and road drivers, and by the refusal of the defendants to permit minority city drivers who transferred to road jobs to carry over seniority (A-12). The Fifth Circuit Court of Appeals further held that a prima facie case of employment discrimination was not effectively answered (A-13). The lower court's judgment was reversed and remanded with directions that the District Court require Lee Way to consider the three plaintiffs for road driver positions as vacancies occurred and to closely supervise the standards used by Lee Way in determining qualifications (A-13).

Yellow Freight System, Inc., Petitioner v. Ernest Herrera, Trine Uribe and Mario Melchor, Respondents

This action is essentially the same as *Resendis* v. *Lee Way, supra.* The three plaintiffs are Mexican-American. Yellow Freight is an interstate commerce carrier and is a party to the same collective bargaining agreement with Teamsters Local Union 657 as Lee Way. The allegations in the complaint are virtually identical to that of the *Lee Way* case.

Yellow Freight has never at any time employed road drivers in San Antonio (Herrera-20, 21, 101, 132).

The three plaintiffs applied for truck driving jobs with Yellow Freight in San Antonio and were hired as city pickup and delivery drivers (Herrera-22, 23, 94, 95, 134-136). Each admitted that this was the best and highest paying truck driving job which Yellow Freight had in San Antonio (Herrera-23, 94, 95, 134-136). Herrera was hired July 7, 1965, Uribe on October 23, 1964 and Melchor on October 17, 1964 (Herrera-19, 81, 117).

At the onset of the trial before the District Court, the parties stipulated to the same agreements made in the *Lee Way* case which are set out *supra* (Herrera-5-7). This stipulation included the stipulation that the two freight companies employed employees on a terminal-by-terminal basis because it was essential to the successful and efficient management of employees working at each terminal location (Resendis-5).

The entry level position for a road driver with Yellow Freight was as a casual employee (Herrera-232). A casual employee works on an irregular basis depending on the volume of work (Herrera-235-237). Under the terms of

the collective bargaining agreement, a casual employee does not have to join the Teamsters union until he becomes a regular employee (Pick-up and Delivery Agreement, Appendix A to Memorandum of EEOC on Rehearing). When a regular job opened up, Yellow Freight's policy was to select the most qualified casual (Herrera-235).

Yellow Freight's policy with respect to transfers from city driving jobs to road driving jobs required the applicant to make out a written application at the terminal location where the job was sought, be willing to relocate to the new terminal location, and meet the standards and qualifications for the job, both driving and physical (A-18). If the applicant met these requirements, he would be employed as a casual driver and thereafter compete with other casuals for an opening as a regular driver (Herrera-235).

Although the three plaintiffs in this case were advised of the company's requirements with respect to transfer, none of them ever made an application for a road driving position anywhere in the Yellow Freight system (Herrera-41, 100, 141). The plaintiffs testified that they were unwilling to accept a road driving job unless they could carry over their full city driving seniority (Herrera-18, 105, 149-150).

The District Court found that none of the plaintiffs could meet the Yellow Freight qualifications for a road driver position due to age, weight or driving record (A-20). The Court additionally found that these qualifications were applied universally to all job applicants and employees and were not in any way racially discriminatory (A-20).

Yellow Freight employed 50 line drivers in Dallas, Texas, which included four Negroes, but no Spanish-Americans (A-25).

In Amarillo, Texas, Yellow Freight had 45 road drivers, including two Negroes and one American Indian, but no Spanish-Americans (A-25).

There was no evidence in the record as to the Mexican-American population in Dallas, Texas or Amarillo, Texas. The District Court was aware of the large Mexican-American population in San Antonio.

As in *Lee Way,* there was no allegation or proof that the plaintiffs had originally applied for a road driver job anywhere or had been deterred because of the employer's reputation. All three plaintiffs testified that they were not aware of any Mexican-American who had applied for a road job and been turned down (Herrera-57; Uribe Deposition-58; Herrera Deposition-23-25).

The District Court found that the failure of the plaintiffs to secure road driving positions was due to a lack of diligence, an unwillingness to give up their city driving seniority, and an inability to meet the job qualifications, rather than racial discrimination, and denied relief (A-20).

The Fifth Circuit Court of Appeals reversed, holding that the statistical evidence (50 road drivers in Dallas and 46 road drivers in Amarillo, none of which were Spanish-American) established a prima facie case of racial discrimination against the plaintiffs, which was unrebutted by the defendant, and reversed and remanded for consideration of a remedy in light of its holding in *Rodriguez* v. *East Texas Motor Freight* (A-26).

REASONS FOR GRANTING THE WRIT

1. The Decisions of the Court of Appeals in the Instant Cases Conflict With the Decisions of the United States Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792 and Edwin L. Wiegand Company v. Jurinko, 414 U.S. 970

The question raised is whether the Fifth Circuit Court of Appeals failed to follow *McDonnell Douglas* in two separate private actions brought by individuals under Section 703(a) of Title VII, 42 U.S.C. 2000e-5(f) and 42 U.S.C. 1981 where no classwide relief was requested, but only relief for the individual plaintiffs in the form of transfer with full seniority and back pay, when it held that:

> (a) statistics alone are sufficient to make a prima facie case and to entitle the plaintiff to the relief requested, and
>
> (b) the plaintiffs did not have the burden of proving that (i) they applied for a job as a road driver at a time when the employer was hiring road drivers, or (ii) they were qualified for the job of road driver, and
>
> (c) class action principles concerning the burden of proof in Title VII litigation apply to a private action by individuals who seek no classwide relief.

The issue is whether the criteria of *McDonnell Douglas* v. *Green* with respect to the burden of proof and the establishment of a prima facie case have general applicability to all private Title VII actions, or whether footnote

13 of the opinion limits the force of the holding to only cases with identical or closely similar factual situations.[1]

The focal point of the issue is the status and force of statistics standing alone, in establishing a prima facie case and carrying the burden of proof where individual relief only is sought in a private Title VII action.

The three plaintiffs in each of the two cases were originally employed as city drivers at terminals in San Antonio, Texas where no road driver jobs were available. They stipulated at trial that they were not discriminated against as defined in Title VII of the Civil Rights Act of 1964, but alleged that following their employment as city drivers, they desired to transfer to road driving jobs but were inhibited from doing so because they would not be permitted to carry over their full city seniority to the road due to the maintenance of separate bargaining units and seniority rosters for city drivers and road drivers.

The District Court which heard these cases, in an opinion written prior to the pronouncements of *McDonnell Douglas, supra*, essentially applied the *McDonnell Douglas* criteria. It found that the plaintiffs had not applied for a

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1. In *McDonnell Douglas* the Court stated at page 802 as follows:

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[13]"

Footnote 13 states:

> "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations."

transfer, were not physically qualified to become road drivers, and were not discriminated against by their employers on account of race.

The Fifth Circuit Court of Appeals in a decision written after *McDonnell Douglas*, held that since the plaintiffs produced statistical evidence that Lee Way Motor Freight only had one Mexican-American road driver in San Antonio and Yellow Freight had no Mexican-American road drivers in Dallas, Texas or Amarillo, Texas, plaintiffs established a prima facie case of discrimination which was unrebutted by the defendant and therefore reversed and remanded with directions to fashion a remedy. The Court of Appeals did not distinguish *McDonnell Douglas* in *Resendis*. In its opinion in *Herrera*, the Court distinguished *McDonnell Douglas* principally on the grounds of footnote 13, *supra;* but went on to further distinguish on the basis that there was a history of hiring discrimination sufficient to make an application for a road job a futile exercise, and the plaintiffs had been denied the opportunity to show that they were qualified to become road drivers because they had not been given a road test. Other than any inferences which might be drawn from the statistics, there was no evidence in the record of any history of hiring discrimination. Also, there was no evidence in the record that the plaintiffs had ever been denied a road test. Apparently the Court inferred this from the fact that there was no evidence in the record that the plaintiffs had ever taken a road test. It is obvious from reading the opinions in *Rodriguez* v. *East Texas*, *Herrera* v. *Yellow Freight* and *Resendis* v. *Lee Way*, that the Court of Appeals drew largely from the more expanded record made in the *East Texas* case, and therefore considered the record in *East Texas*, which was a class action, as part of the record in *Resendis* and *Herrera*.[2] Additionally, the Court of Appeals drew on its experience in other trucking cases in reaching its decision, rather than limiting its consideration to the facts in the record in *Resendis* and *Herrera* (see footnote 17 in the *Rodriguez* opinion).

The sum effect of the decisions of the Fifth Circuit is to completely emasculate the force of the holding in *McDonnell Douglas* on the authority of footnote 13, *supra*. The holding of the Fifth Circuit is essentially that any member of a minority race seeking individual relief in a private racial discrimination case, carries the burden of proof and is entitled to recover, without the necessity of showing application, qualification, vacancy or any of the other criteria set out in *McDonnell Douglas* upon a showing of statistical imbalance alone. A court can imply from the statistical imbalance that the requirement of an application would be a futile gesture and therefore not necessary. The requirement that a plaintiff prove that he is qualified is also waived as a futility, either by an inference raised from the statistical imbalance or by an inference raised from the lack of any evidence in the case that the plaintiffs ever took and passed a road test, only one of several qualifications required of a road driver. It is difficult to determine on what the Fifth Circuit Court of Appeals based the inference of futility with respect to qualifications, because it recites no evidence in the opinion from which any such an inference was drawn. The district judge who heard these two cases found on the record that the plaintiffs were not qualified. The opinion of the Fifth Circuit Court of Appeals ignored completely this finding in *Herrera* and

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2. There was an agreement by counsel that certain testimony in the *Herrera* case would be considered to be part of the record in the *Resendis* case, but there never was any agreement that the evidence in the *Rodriguez* case would be a part of the record in either *Resendis* or *Herrera* (Resendis-5).

Resendis. In *Rodriguez* the Court stated that the trial court's finding of lack of qualifications was premature, because there was an issue in that case as to whether or not the qualifications were discriminatory. No such issue existed in *Herrera* and *Resendis* (Herrera-6; Resendis-4, 5).

If the opinions in these cases are allowed to stand, only the broad picture will be viewed in individual Title VII actions, and there will never be any focus on the individuals involved and the circumstances giving rise to their claims, which petitioners submit is contrary to *McDonnell Douglas.*

The Supreme Court of the United States has met this issue once before and has clearly articulated the force of its holding in *McDonnell Douglas.*

In *Wiegand Company* v. *Jurinko,* 477 F.2d 1038 (C.A. 3, 1973), the Court held at page 1043 that statistical evidence made out a prima facie case of discrimination. In footnote 12 at page 1044, the Court of Appeals held that the plaintiffs did not have the burden of proving that they were qualified in making out their prima facie case of discrimination, but rather once the plaintiffs established a prima facie showing by statistics, the burden shifted to the employer to prove the plaintiffs were not qualified. The Supreme Court in a per curiam opinion on October 23, 1973 granted a writ of certiorari, vacated the judgment and remanded the case to the Court of Appeals for further consideration in light of *McDonnell Douglas* v. *Green.* See *Wiegand* v. *Jurinko,* 414 U.S. 970.

At least two other Circuit Courts of Appeals have held that statistical evidence cannot make out a prima facie case or carry the burden of proof in an individual Title VII action.

The Eighth Circuit Court of Appeals in *King* v. *Yellow Freight Systems, Inc.,* 10 EPD ¶10,411, Oct. 25, 1975, stated:

> "Although statistical evidence of a pattern or practice of discrimination is of probative value in an individual discrimination case for the purpose of showing motive, intent or purpose, *cf.* Marquez v. Omaha District Sales Office, Ford Division of Ford Motor Company, 8th Cir. 1971, 440 F.2d 1157, it is not determinative of an employer's reason for the action taken against the individual grievant."

This holding would seem to accord with the holding of the Supreme Court in *McDonnell Douglas,* wherein step three of the three-step procedure inquired into whether or not the employer's reason for not employing the applicant was pretextual. On the issue of pretext, the Supreme Court indicated that statistics as to an employer's employment policy and practice might be helpful to a determination of whether the refusal to employ conformed to a general pattern of discrimination. See also *Peltier* v. *City of Fargo,* 396 F.Supp. 710 (D.C.S.E.Div., N.D., June 25, 1975).

The Eighth Circuit Court of Appeals has held that statistical evidence can make out a prima facie case in a class action where classwide relief is sought. *Rogers* v. *International Paper Company,* 510 F.2d 1340 (C.A. 8, 1975); *Gilmore* v. *Kansas City Terminal Railway Company,* 509 F.2d 48 (C.A. 8, 1975).

The Sixth Circuit Court of Appeals has not held that statistical evidence alone will establish a prima facie case of discrimination in a class action, but recently reversed the class action aspect of a case where only statistical evidence was relied upon for further consideration by the District Court to determine whether or not there was a prima facie case established. *Rice* v. *The Gates Rubber Company,* 521 F.2d 782 (C.A. 6, August 25, 1975). Again, however, the Sixth Circuit has given a clear indication that where in-

dividualized relief is sought, attention must be focused on what happened to the individual. *EEOC* v. *Detroit Edison, et al.*, 515 F.2d 301, 316 (C.A. 6, March 11, 1975); *Laugesen* v. *Anaconda Company*, 510 F.2d 307, p. 311 (C.A. 6, 1975).

Unless certiorari is granted in this case and the judgment in *Resendis* and *Herrera* vacated, the effect of the holding of the Supreme Court in *McDonnell Douglas, supra* and *Jurinko, supra* will be destroyed or at least severely diminished and there will be a conflict between the Fifth Circuit and the Sixth and Eighth Circuits with respect to the force and effect of statistical evidence alone in an individual Title VII action as it relates to the criteria for the establishment of a prima facie case and the carrying of the burden of proof.

2. The Decisions of the Fifth Circuit Fail to Follow the Controlling Decision of This Court in McDonnell Douglas v. Green, Supra and Conflict With the Decision of the Sixth Circuit in EEOC v. Detroit Edison, Supra, Because They Do Not Require That Plaintiffs Prove They Were Harmed by Some Initial Act or Practice of Employment Discrimination Which Was Perpetuated by the Existence of Separate Bargaining Units or a No-Transfer Rule

Under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. Section 1981, practices and procedures "neutral on their face, and even neutral in their terms and intent, cannot be maintained if they operate to 'freeze' the status quo of *prior discriminatory employment practices.*" (Emphasis supplied.) *Griggs* v. *Duke Power Company*, 401 U.S. 424, 429-30 (1971). Assuming for the purpose of argument that a facially neutral "bargaining unit seniority" system and a company imposed "no-transfer" rule affecting transfers between bargaining units may tend to lock individuals into the positions in which they were originally employed, nevertheless, an individual may not obtain relief under federal law without proof of some initial act or practice of employment discrimination which has adversely affected him as an individual. Without that initial showing that an individual was shunted or forced into a lower paying, less desirable job because of his race or national origin, there can be no discriminatory practice to perpetuate. *Cf. Jones* v. *Lee Way, supra.*

Plaintiffs in *Resendis* and *Herrera* made no claim that an initial act of employment discrimination forced them into the lower paying bargaining unit. In fact, plaintiffs stipulated they were hired without discrimination and the sole claim of discrimination was based on the fact that after their initial employment they were "locked in" to the lower paying job of city driver and denied a job as a road driver because of the maintenance of separate seniority rosters and the company's no-transfer rule. The record clearly shows plaintiffs made no claim that they had initially applied for the higher paying road driver positions, and there was simply no allegation or evidence to support the claim that plaintiffs were deterred from applying for those positions because the defendants reputation of employment discrimination led them to believe applications would have constituted futile efforts to obtain employment as road drivers.

At trial, all six plaintiffs testified they knew of no Mexican-Americans who had sought employment as an over-the-road truck driver for the defendant companies and had been denied employment in that position.

The Fifth Circuit Court of Appeals completely ignored the pleadings and stipulations of the parties and constructed both the theory and proof supporting a judgment for plain-

tiffs. The Court of Appeals concluded that because the statistical evidence revealed an imbalance in hiring in the road driver classification regarding Spanish-American employees, a prima facie showing of discrimination had been made. From the statistics and from recognition of the "mobility of today's minorities", the Court presumed that the individual plaintiffs would have initially applied for jobs as over-the-road drivers at terminals where those jobs were available, but were deterred from making such applications because of the knowledge that applications would have been futile. In fact, two of Lee Way plaintiffs stated at trial they would not consider seeking employment outside the San Antonio area; and the three Yellow Freight plaintiffs testified they refused to make application for road driver positions at the defendant's Baxter Springs terminal when encouraged to do so by the company. The Court's presumption regarding plaintiffs' "mobility" was, therefore, clearly refuted by the record.

The Court of Appeals has radically departed from the accepted and usual course of judicial proceedings by wrestling control of the pleadings and proof from the plaintiffs, deciding the case on a factual issue clearly abandoned by plaintiffs in their stipulations, and presuming a factual basis for recovery beyond the contemplation of any of the parties to the original trial. Stipulations of litigants are traditionally judicial admissions which bind the Court of Appeals to the facts and issues presented. *Furniture Forwarders of St. Louis* v. *Chicago, Rock Island & Pacific Railroad Company*, 393 F.2d 537 (8th Cir. 1968); *Gambill* v. *United States*, 276 F.2d 180 (6th Cir. 1960); *Randall Foundation* v. *Riddell*, 244 F.2d 803 (9th Cir. 1957).

However, in a broader sense the holding of the Fifth Circuit Court of Appeals has adopted a theory which con-

flicts with the holding in *Equal Employment Opportunity Commission* v. *Detroit Edison Company*, 515 F.2d 301 (6th Cir. 1975), and contravenes the principle announced by this Court in *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792 (1973).

At trial, the plaintiffs made no attempt to prove that they had initially applied for road driver positions and had been rejected because of their race. In fact, the evidence conclusively showed there were no road driver jobs available in San Antonio where the individual plaintiffs were initially employed; and plaintiffs knew of no Spanish-surnamed individual who had been denied employment as a road driver by the defendant companies. It is clear under the principle announced in *McDonnell Douglas* v. *Green, supra* that the plaintiffs failed to prove an initial act of discrimination when they failed to show that they applied for jobs as over-the-road truck drivers at times when those jobs were available.

To obviate the need for proof of an initial act of discrimination which could be perpetuated by the facially neutral practices of the companies, the Fifth Circuit announced a sweeping doctrine of futility to excuse the plaintiffs from any showing of discrimination against them as individuals. The Court of Appeals went outside the record to consider evidence in other trucking industry cases including the evidence in *Rodriguez* v. *East Texas Motor Freight, supra* in support of its holding. From the statistics which showed a low percentage of Mexican-American individuals employed as over-the-road drivers in other cities, without any showing of the Mexican-American population in those cities, the Court of Appeals inferred that the plaintiffs were discouraged from making application for road driving jobs based on the historically discriminatory practices within the industry. Yet, the Sixth Circuit

Court of Appeals has very recently held the futility concept applicable only upon specific pleading and proof. The Court said:

> "[T]he court also included in the class represented by the private plaintiffs those persons who would have applied for employment with Edison except for its reputation of not hiring blacks . . . . [T]here was no allegation that this reputation actually deterred anyone from applying for employment. No witness testified that he would have applied for employment at Edison but was deterred because of its bad reputation." 515 F.2d at 311-2.

Absent specific pleading and proof, relief for the so-called "futility class" was denied, notwithstanding statistical proof of historical exclusion of minorities. See also: *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416, 422 (6th Cir. 1974), approving the award of back pay only to individuals who were actually injured by the company's no-transfer rule as determined by those who had made some "past expression of interest in a road position."

Certiorari should be granted to resolve a conflict within the circuits regarding the quantum of proof necessary to excuse the requirement that an individual must show he made an application for employment before he may recover back pay and other forms of individual relief under the rubric of futility. In addition, certiorari should be granted to conform the decision of the Fifth Circuit with the recent pronouncements of this Court in *McDonnell Douglas* v. *Green* requiring that a plaintiff seeking individual relief prove that an application for employment was made at a time when positions were being filled in order to make a prima facie showing that the individual was harmed by a discriminatory employment practice.

3. The Decisions of the Fifth Circuit Court of Appeals Are in Conflict With McDonnell Douglas, Supra and Griggs v. Duke Power Co., 401 U.S. 424, Because by Stipulation and Uncontroverted Evidence the Plaintiffs Were Not Physically Qualified for Road Driving

The Court of Appeals ignored and refused to follow *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429 (1971) and *McDonnell Douglas Corporation* v. *Green, supra,* not only in its holding that under the facts of the case a prima facie case was made by statistical evidence, but also in its holding, 505 F.2d 71:

> "The prima facie case of employment discrimination by Lee Way, the Southern Conference, and Local 657 against Resendis, Escobedo and Gonzalez has not been effectively answered."

This Court said in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429:

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.
>
> "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate indivdiously to discriminate on the basis of racial or other impermissible classification."

This statement of the Congressional intention is reinforced by *McDonnell Douglas*, which repeats the foregoing language at 411 U.S. 800, 801.

Although strongly urged to follow *Griggs* and *McDonnell Douglas*, the Fifth Circuit did not cite or refer to either case in *Resendis*.

All three of the plaintiffs, by stipulation or by uncontroverted evidence, were shown to be unfit to meet the physical requirements as road drivers.

As to Resendis, the record shows (RA-63) that on March 4, 1973 a road driver position opened at Lee Way in San Antonio. This position was offered to Resendis with the understanding that if he took the position he would have thirty days to decide whether or not he wanted to retain it and if he did not, he could return to his old position as a city driver without loss of seniority.

Mr. Resendis accepted the road driver position on March 4, 1973. He took seven road trips.

On March 16, 1973 Mr. Resendis stated that he did not want to continue as a road driver but wanted to return to his city driver job because he was taking a considerable pounding driving on the road and was having stomach trouble and that his doctor told him that unless he wanted to have an ulcer and continual trouble with his stomach he should quit the road job. Mr. Resendis gave the terminal manager a letter on March 16, 1973 signed by Mr. Resendis and by a representative of Local 657 and Mr. Resendis was returned to his city driver job in San Antonio.

Thus Mr. Resendis by his own attempt in a ten day trial period to meet the physical demands of road driving demonstrated to himself and to management that he could not do so, and voluntarily returned to city driving.

Escobedo for the past three years had weighed 300 pounds. This was 75 pounds over the maximum weight limitation of the Lee Way standard for road drivers. In addition he had had trouble in one leg resulting from three gunshot wounds in 1960 (Resendis-22). He was off 90 days in 1971 and six months in 1969 because of trouble with his leg. During the past five years he had been off sick because of poor circulation, nose bleeding and high blood pressure (Escobedo Deposition-35-40, 58, 59).

The mattresses in sleeper cabs are 34″ wide and 78″ long. Any weight over 225 is considered obese. If Mr. Escobedo were in a sleeper bunk with safety belt fastened, he could not even move and would suffer fatigue, which was a great safety hazard (Resendis-172). Line drivers have vehicle breakdowns and are sometimes involved in situations where they are alone on the highway. Because of his obesity and lack of mobility, he was not physically qualified for road driving.

The Lee Way standard fixes the minimum acceptable height for road drivers at 5′7″. This is necessary because road equipment is heavy, mutigeared and usually with dual trailers, and anyone below that height would have trouble reaching the pedals and handling the brakes and clutch and would be unable to have full vision of the road.

Mr. Elias Gonzalez is only 5′5″ tall (Gonzalez Deposition-20).

The Department of Transportation (DOT) issued Motor Carrier Safety Regulations in June, 1972 dealing, in Part 391, with qualifications of road drivers. The historical antecedent for these regulations is Section 8, Interstate Commerce Act, Part II: Motor Carriers, Title 49, U.S.C. Section 301 effective October 1, 1935 (Section 327).

The ICC Revised Safety Regulations in effect in 1965 and several years prior thereto were Number 191.12, *et seq.*

DOT took over the functions of ICC as to motor carriers on April 15, 1967 and then issued its rules and regulations. The current Motor Carrier Safety Regulations were issued in June, 1972.

Part 391 dealing with qualifications for drivers, states in 391.1(b):

> "The rules in this part and in other parts of this subchapter do not prevent a motor carrier from imposing more stringent or additional qualifications, requirements, examinations or certificates than imposed by these rules."

The Lee Way rules and regulations governing road drivers at Lee Way terminals are in the published Station Manual (Resendis-Exhibit M). The height limitations for road drivers are 5'7" minimum and 6'2" maximum. The weight limitation is 225 pounds maximum (Resendis-170).

It was stipulated that the Lee Way road driver standards and qualifications are racially neutral and non-discriminatory and the trial judge found them to be reasonable.

Since Mr. Resendis, Mr. Escobedo and Mr. Gonzalez could not pass the physical requirements for a road driver job, the question whether the meager statistics offered would make a prima facie case is immaterial. *Mayor v. Educational Equality League*, 415 U.S. 605, 621, 622.

In applying the four criteria required of complainants in a Title VII trial set out in *McDonnell Douglas* (411 U.S. 801), none of these respondents, Resendis, Escobedo or Gonzalez, meets:

> "(ii) that he applied and *was qualified* for a job for which employer was seeking applicants."

or

> "(iii) that, *despite his qualifications*, he was rejected." (Emphasis supplied)

Nor can any of the plaintiffs claim that the physical disqualifications are merely pretextual because they result from plaintiffs' stipulations or plaintiffs' own testimony.

Moreover, the questions of whether these plaintiffs were "locked in" by union contracts and could not carry city seniority over to road jobs is likewise not material where, as here, even if they could do so, they could not physically qualify for road jobs.

Thus the Court of Appeals for the Fifth Circuit has declined to follow the controlling law of *Griggs* and *McDonnell Douglas*, and for this reason writ of certiorari should be granted.

The case of *Herrera* v. *Yellow Freight* is substantially the same as *Resendis* v. *Lee Way*. As in it, certiorari should be granted for failure to follow the holdings in *Griggs* and *McDonnell Douglas*.

Yellow Freight has never had road drivers in San Antonio. It does have city drivers who are residents of the San Antonio area.

It was stipulated that:

> "(e) The plaintiffs do not contend that the defendant, Yellow Freight's standards and qualifications for line driving jobs are discriminatory in violation of Title VII of the Civil Rights Act." (Herrera-5)

The trial judge found (A-20):

> "None of the plaintiff employees could satisfy all of the qualifications for a road driver position due to age or weight or driving record. The qualifications apply universally to all job applicants and employees and are not in any manner racially discriminatory."

Yellow Freight System, Inc. is a common carrier by motor vehicle operating in interstate commerce over regular and irregular routes, hauling freight under the provisions of the Interstate Commerce Act. Its operations are nationwide (RA-30). It has a road terminal in Dallas, Texas and another road terminal in Amarillo, Texas.

Nothing whatever was shown by plaintiffs as to the racial percentages in the populations of these two cities.

Hiring in the entire Yellow Freight system is done locally at each terminal by the terminal manager. Anyone seeking a road driving job must go to the location of the terminal and make application there (Herrera-179, 231, 255-260, 309, 310). This is a necessary and reasonable business practice.

There are a great many differences between the qualifications, duties and responsibilities between road drivers and city drivers. Line drivers are required to pass the Department of Transportation examinations (Herrera-Exhibit T) and physical examinations, and the tests of Yellow Freight (Herrera-Exhibit M, Attachment 8; RA-30), including the Yellow Freight physical examination, which is more rigorous than the Department of Transportation examination (Herrera-244).

Road driving, unlike city driving in San Antonio, requires experience in severe winter and severe summer and mountain driving (RA-30).

There is a great deal of difference between city equipment and road driving equipment. Road driving is usually with tractors and 40-foot or longer trailers, or dual trailers, which is far more costly and heavy than city equipment with far more valuable cargo. Road driving is at higher speeds requiring a far longer stopping time and distance. Road accidents result in greater and more costly injuries, and greater possibility of death (Herrera-82, 83, 245, 246).

None of the three plaintiffs, Herrera, Uribe or Melchor, at any time before or after their employment with Yellow Freight, made an application for a road driver's job or went to the cities where road terminals were maintained, Amarillo, Texas, Dallas, Texas, or any other city in the Yellow Freight system to seek a road driver's job.

In *Yellow Freight*, 505 F.2d 66, 68, the Fifth Circuit attempted to distinguish the application of *McDonnell Douglas* from the application it made in *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40 on the ground that the *East Texas* case was a class action whereas only individuals in that capacity sued in *Herrera* v. *Yellow Freight*. It said, l.c. 68:

> "Although the instant case is not a class action, we are of the view that McDonnell Douglas is distinguishable on the other two grounds. Here there is a history of past hiring discrimination and as in Rodriguez, the plaintiffs had no opportunity to take a road test and thus to prove their qualifications."

Even assuming the record supported such distinctions, which it does not, this was not a proper application of the holdings of *Griggs* and *McDonnell Douglas*, and in our view represents a misunderstanding of the effect of such decisions, and for this reason as well as others stated, calls for the issuance of this Court's writ of certiorari.

4. The Fifth Circuit's "Qualification Date" Formula Conflicts With the Measure of Proof Established by the Sixth Circuit in Thornton v. East Texas Motor Freight, Supra, With Respect to Eligibility for Back Pay and Back Seniority

The Fifth Circuit Court of Appeals in *Rodriguez* v. *East Texas Motor Freight, supra,* decided the trilogy of trucking cases before it, including the cases which are the subject of the instant petition, on the so-called "qualification date" formula for determining both seniority and back pay purposes. According to that formulation, an individual plaintiff is entitled to fictional seniority and back pay from the date on which he became qualified to be an over-the-road truck driver, regardless of any application for or expression of interest in employment in that classification. The Sixth Circuit expressly rejected the "qualification date" formulation in *Thornton* v. *East Texas Motor Freight,* 497 F.2d 416 (6th Cir. 1974).

The Sixth Circuit affirmed the lower court's order awarding back pay and fictional seniority only to those individuals "who had indicated a desire to transfer to over-the-road positions." 497 F.2d at 421. The Court did not make back pay relief awardable only to those employees who had made formal application for transfer; rather, those individuals who had expressed some indication of a desire to transfer were eligible to make a further showing that they had been harmed by the defendant's allegedly discriminatory employment practices. The Sixth Circuit discounted the argument that each individual who is presently willing to transfer to a road driver job should be awarded relief, stating:

> "[T]he prospect of a large back pay award invalidates present intention as an accurate indication of past intention. An employee who may not have wanted on-the-road employment in the late 1960's because of the increased number of hours of work and time away from home, might well change his mind now if the prospect of a large back pay windfall is present." 497 F.2d at 422.

The Fifth Circuit recognized its formulation of relief conflicted with that of the Sixth Circuit, stating "[t]he qualification-date formulation was rejected recently by a divided panel of the Sixth Circuit." *Rodriguez* v. *East Texas Motor Freight, supra* at 64. The Fifth Circuit held that the best indication of a person's desire to transfer to a road driving job in the past was his present willingness to transfer "so long as we do not create special incentives or disincentives that skew the balance." 505 F.2d at 64. The Sixth Circuit recognized that the prospect of a large back pay award necessarily creates a "special incentive" to diminish the probative force of a claimant's present intention to work over-the-road.

The application of these principles involves the application of the test established by this Court in *McDonnell Douglas* v. *Green, supra* and establishes radically different measures of proof between the circuits on the important issues of back pay and seniority relief. This Court should grant certiorari to review the issues involved and establish uniform and authoritative guidelines for the federal courts to follow in administering Title VII cases.

CONCLUSION

Wherefore, Petitioners pray that a writ of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Fifth Circuit in the above-entitled cases.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the District Court of the United States
For the Western District of Texas
San Antonio Division

Civil Action No. SA-71-CA-282

Patrick Resendis, et al.,

v.

Lee Way Motor Freight, Inc., et al.

Findings of Fact and Conclusions of Law

On the 24th day of January, 1973, came on to be heard the above entitled and numbered cause for trial on the merits, and both parties appeared in person and by their Attorneys of Record and announced ready for trial, whereupon the Court proceeded to hear the evidence from the witnesses and oral arguments of counsel and at the conclusion of the trial and after consideration of all the pleadings, the evidence adduced by both parties, the arguments of counsel and applicable law, the Court hereby makes its Findings of Fact and Conclusions of Law.

Findings of Fact

1. This Court has jurisdiction of this action by virtue of Title 42, U.S.C., Section 2000 e-5(f) and Title 28, U.S.C., Section 1343 (4) providing a cause of action under Title 42, U.S.C., Section 1981.

2. The plaintiffs are employees of the defendant truck line and members of the defendant Union and its

affiliates (Local 657 of the Southern Conference of Teamsters and the International Conference of Teamsters), with the exception of Arturo Rodriguez who is no longer an employee of the defendant truck line. Plaintiffs are all Mexican-American residents of the United States and residents of San Antonio, Bexar County, Texas, with the exception of Wilburn White who is a Black-American. The defendant truck line is a corporation doing business in the State of Texas and the City of San Antonio and operates and maintains a local city-wide freight terminal and a city-wide trucking service in San Antonio, Bexar County, Texas and is an employer within the meaning of Title 42, U.S.C., Section 2000e-(b). The defendant Union and its affiliates are the representatives and bargaining agents of the plaintiff employees on an international, regional and local basis.

3. The plaintiffs were hired by the defendant truck line as follows:

Tony Escobedo became a regular city driver through the acquisition in 1966 of Texas-Arizona Motor Lines and has continued in that position to this date;

Patrick Resendis became a regular city driver in May, 1963, and has continued in that position to this date;

Arturo Rodriguez became a regular city driver in October, 1962, and transferred to an over-the-road driver job in May, 1967; in October, 1971 he was dismissed due to excessive accidents and is no longer an employee of the defendant truck line;

Wilburn White has been employed on a casual basis (i.e., whenever he was needed) as a city driver or dock worker since 1967 and continues in that status at this date; and Elias Gonzales began work as a city driver in 1950 and continues as such to this date.

4. It is stipulated that none of the plaintiff employees were discriminated against as to their original employment.

5. The defendant truck line had no road drivers domiciled in San Antonio, Bexar County, Texas prior to its acquisition of Texas-Arizona Motor Lines in 1966 and was operated solely as a local, city-wide pick-up and delivery service. Subsequent to the acquisition of Texas-Arizona Motor Lines, which had road drivers domiciled at San Antonio, the Company has operated a domicile for road drivers at San Antonio, Texas.

6. Of the twenty-six (26) road drivers currently listed for the San Antonio terminal, the Company has hired five, one of whom, the plaintiff Rodriguez, has been dismissed. Of the remaining twenty-two (22), all were employed by the acquired Texas-Arizona Motor Lines; the defendant Company had no part in the hiring of these employees.

7. Of the five road drivers referred to above, which the Company has hired, the plaintiff Rodriguez was among the first so hired.

8. On April 1, 1970 the defendant truck line and the defendant Union entered into the National Master Freight Agreement and Southern Conference Area Local Freight Forwarding Pickup and Delivery Supplemental Agreement (hereinafter referred to as "Union Contract") which expires June 30, 1973 and the terms and conditions of which are fully known and understood by the plaintiff employees. The plaintiff employees have ratified this contract and prior similar contracts since the time of their employment, with the exception of Arturo Rodriguez who voted against ratification of the current contract solely because of the strike and lock-out by the Chicago bargain-

ing unit in the Spring of 1970 and not due to any contract clause made the subject of this suit.

9. The provisions of the Union Contract providing for job transfer from a city driver to a road driver and vice versa, including the provision for separate seniority lists for city and line drivers, apply to all job applicants and employees regardless of race or qualifications, and are not in any way discriminatory.

10. The defendant truck line's policy and regulations regarding job transfers are generally:

(a) The applicant must make written application for a new position at terminal location where the job is sought;

(b) The applicant must be willing to re-locate at the new terminal location;

(c) For a road driver job, applicants must pass certain standardized Department of Transportation tests and company tests (driving and physical); and

(d) The applicants must have certain road driving experience.

These regulations are not unreasonable and apply to all job applicants and employees regardless of race or qualifications. The fact that each terminal is autonomous as concerns the employment of drivers is proper and in accordance with accepted business practices.

11. The defendant truck line began posting bulletins as to the availability of jobs at other terminals, including road driver jobs, in 1971. The defendant truck line has attempted to recruit minority employees through local job fair programs and newspaper advertisements, including

advertisements placed in minority publications, and at present has a policy requiring that before hiring a non-minority employee to fill an opening, the terminal manager must first contact the Company's personnel office and explain satisfactorily why he is not hiring a minority employee for the job.

12. The plaintiff, Patrick Resendis, has not signed up under any of the job opportunity bulletins relating to road driver job openings at other terminals. Neither has the plaintiff, Tony Escobedo, or the plaintiff, Elias Gonzales.

13. The plaintiff, Elias Gonzales, has never asked for a road driver job and states that he would not move from the San Antonio area to take one and refuses to give up any of his city driver seniority to take one.

14. The plaintiff, Arturo Rodriguez, was dismissed by the defendant truck line because of a poor driving record involving at least two accidents within the one year period immediately preceding his dismissal. Police accident reports indicated that he could have avoided at least one of the accidents. The defendant truck line's dismissal of the plaintiff, Arturo Rodriguez, was upheld through the Union grievance procedure and did not result from any discrimination against this plaintiff because of his race or national origin. The dismissal was for valid and proper business reasons.

15. The plaintiff, Tony Escobedo, is 5'9" tall and weighs almost 300 lbs. He has a very bad left leg, having been shot three times. The bad leg and his overweight condition are of continuing medical concern and cause plaintiff to be unusually slow in the performance of his current duties and prevent his physical qualification for the job of road driver. Any denial by the defendant truck line of a road driver job under these facts is for valid and

proper business reasons and not in any way the result of discrimination against the plaintiff, Escodebo, because of his race or national origin.

16. The plaintiff, Wilburn White, has never made application for a road driver job. During the period that the plaintiff, White, worked as a casual employee for the defendant truck line, two other Black-Americans were also employed as casual employees. Two other Black-Americans were hired as regular city drivers in August and September of 1972. The defendant truck line has employed other Black-Americans as regular city drivers in the past. The failure to hire the plaintiff, White, has not been the result of any racial discrimination on the part of the defendant truck line, and was so admitted during the plaintiff White's testimony in Open Court. The plaintiff, White, stated that discrimination, if any, against him was personally rather than racially oriented. The Court finds that there has been no unlawful discrimination against this plaintiff whatsoever.

17. The defendant truck line employs a substantial number of Mexican-American and Negroes in its San Antonio Terminal operations (both city and road) and there has been no showing of discrimination as regards the hiring practices of that office.

18. The plaintiff employees have never filed a discrimination grievance charging a violation under Article 38 of the Union Contract.

19. The plaintiff employees have never availed themselves of participating in the contract amendment negotiation meetings at the local Union level in an effort to change the job transfer requirements.

20. The plaintiff employees have not been discriminated against by their Union as the Union is comprised of

a majority of Mexican-Americans and Negroes and every member is free to participate in the contract negotiating process and to vote on every issue or contract presented to the membership.

21. When the plaintiff employees inquired from various supervisory personnel at the San Antonio Terminal as to the method of securing a road driving position, they were not discouraged nor mislead, but rather the requirements were explained (i.e. they would have to make application at the road driving terminal location, etc.) and the plaintiffs chose not to make application. The failure of the plaintiff employees to secure a road driving position was due to a lack of diligence on their part, an unwillingness to give up their city driving seniority, and an inability to meet the job qualifications rather than actual racial discrimination by either the defendant truck line or the defendant Union.

22. Both the defendant truck line and the Union defendants are bound by the contracts in that neither can unilaterally change the contract provisions by allowing a merger of seniority lists, a transfer of seniority or in any other manner attempting to alter, combine or discard the provisions of the separate contracts for city and road drivers without subjecting themselves to economic or other negative sanctions by the non-offending party.

23. Refusal by the defendant truck line to permit job transfers without loss of terminal seniority or to maintain separate seniority lists is a reasonable and proper business practice and in accordance with the Union Contract and in no manner causes, perpetuates or results in discriminatory practices by any of the defendants.

24. The fact that there are separate Union Contracts and job qualifications for city and road drivers is reason-

able both as an accepted business practice and by the fact that the National Labor Relations Board recognizes the two job groups as separate bargaining units.

25. The defendant truck line did not prevent or discourage the plaintiff employees from seeking or securing a road job transfer nor from making written application for said position because of their race or because they filed a Complaint with the Equal Employment Opportunity Commission, or for any other reason.

26. The defendant truck line and Union did not discriminate against the plaintiff employees because they made a charge or indicated they would make a charge against the defendants to the Equal Employment Opportunity Commission.

27. The defendants did not discriminate against the plaintiffs or any other employee or Union member on the basis of race or otherwise.

28. While not compelling, further evidence of the continuing desire of the vast majority of the local Union membership is contained in the Affidavit of R. C. Shafer, President and Business Manager of the local Union, and George Hardeman, Jr., Recording Secretary of the local Union, filed February 23, 1973, and stipulated to by the parties to this suit by Stipulation filed March 6, 1973. The Affidavits show that at the Union Membership meeting on February 11, 1973, after the trial of this case was completed, the employees of the defendant truck line, and others, rejected proposals that the next City and road driver contracts be merged and that both job classifications be permitted to transfer to the other with company seniority for all purposes. A further proposal to the effect that the seniority of the employees working for the freight

lines remain as it is in the current contracts was approved by a vote in excess of two to one.

Conclusions of Law

1. I conclude as a matter of law that none of the defendants violated Title 42, United States Code, Section 2000e-5 or any section of Title 42 relating to race discrimination.

2. I further conclude as a matter of law that the plaintiffs, and each of them, take nothing by reason of their suit and that the defendants and each of them are entitled to judgment.

3. I further conclude that the defendants, and each of them, recover their court costs incurred herein against the plaintiffs.

Entered this 22nd day of March, 1973, at San Antonio, Texas.

/s/ John H. Wood, Jr.
United States District Judge

APPENDIX B

69

Patrick RESENDIS, Tony Escobedo, Wilburn White, Arturo Rodriguez and Elias Gonzales, Plaintiffs-Appellants,

v.

LEE WAY MOTOR FREIGHT, INC., et al., Defendants-Appellees.

No. 73-2322.

United States Court of Appeals, Fifth Circuit.

Nov. 25, 1974.

Mexican-American city truck drivers, former Mexican-American regular road driver and Negro casual city driver instituted employment discrimination action against motor carrier and union organizations. The United States District Court for the Western District of Texas, John H. Wood, Jr., J., rendered judgment in favor of the defendants and the plaintiffs appealed. The Court of Appeals, Wisdom, Circuit Judge, held that statistics established prima facie case of past discrimination in the hiring of road drivers; that discrimination had been continued by motor carrier's "no-transfer" policy restricting transfers between city driver jobs and more lucrative road driver jobs and by maintenance of separate seniority rosters; that past hiring discrimination was perpetuated following abandonment of the "no-transfer" policy; that defendants failed to effectively answer prima facie case of employment discrimination against Mexican-American city drivers; that discharge of

Mexican-American over the road driver was not result of discrimination; and that Negro casual city driver failed to prove that refusal to accord him regular status was result of racial discrimination.

Affirmed in part; reversed in part and remanded.

70

Ruben Montemayor, Harry A. Nass, Jr., San Antonio, Tex., for plaintiffs-appellants.

Theo F. Weiss, San Antonio, Tex., Paul Scott Kelly, Jr., Raymond F. Beagle, Jr., Kansas City, Mo., for Lee Way.

Edward W. Penshorn, Bradford F. Miller, San Antonio, Tex., for Local 657.

G. William Baab, Hal K. Gillespie, L. N. D. Wells, Jr., Dallas, Tex., for Southern Conference.

Before WISDOM, AINSWORTH and GODBOLD, Circuit Judges.

WISDOM, Circuit Judge:

Like its companion Title VII cases, Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40, and Herrera v. Yellow Freight System, Inc., 5 Cir. 1974, 505 F.2d 66, this appeal involves claims of discrimination in the exclusion of minority persons from the sought-after road driving jobs in the trucking industry. Plaintiffs Resendis, Escobedo, and Gonzales are Mexican-American city drivers for Lee Way Motor Freight, Inc. in San Antonio, Texas. Plaintiff Rodriguez was formerly a regular over-the-road driver in San Antonio for Lee Way, but was discharged after four and one-half years as a line driver. Plaintiff White is a Negro "casual" city driver for Lee Way in San Antonio.[1] The

1. "Casual" drivers have no seniority. They are not required to work only for one company, but may take jobs as casuals with a number of trading companies in the area.

same district judge who decided *Rodriguez* and *Herrera* found that the plaintiffs had failed to prove a case of discrimination against any of the defendants under Title VII. We affirm in part and reverse in part and remand.

[1] Prior to January 1, 1966, Lee Way domiciled only

71

city drivers in San Antonio. At that time, Lee Way acquired three-fourths of the assets of Texas-Arizona Motor Freight, Inc., which included an over-the-road terminal in San Antonio. Upon the acquisition, the 25 or 30 white/anglo road drivers domiciled there became the employees of Lee Way. Since then, Lee Way has hired approximately six white/anglo line drivers, and one Mexican-American line driver at the San Antonio terminal. The sole Mexican-American road driver is the plaintiff-appellant Antonio Rodriguez, who was discharged in 1972. Lee Way has never employed a Negro line driver in San Antonio. Of 44 city drivers for Lee Way in San Antonio, 26 or 28 are Mexican-American, four are black, and the remainder are white/anglo. Especially in light of the contrast in the percentage of minority employees between Lee Way's city and road driving fleets, we hold that these statistics establish a prima facie case of discrimination in the past hiring of road drivers.

[2-3] This discrimination has been continued by Lee Way's no-transfer policy, and by the maintenance of separate seniority rosters through the action of Lee Way, Local 657, and the Southern Conference.[2] Lee Way abandoned its no-transfer policy in 1971, but the perpetuation of past hiring discrimination was continued through the refusal of the defendants to permit minority city drivers

2. We find no violation of Title VII by the defendant Teamsters International. See Herrera v. Yellow Freight System, Inc., 5 Cir. 1974, 505 F.2d 66, n. 2.

to carry over their competitive status seniority to road driver jobs.[3]

[4-7] The prima facie case of employment discrimination by Lee Way, the Southern Conference, and Local 657 against Resendis, Escobedo, and Gonzales has not been effectively answered.[4] We reverse the lower court's judgment with regard to these plaintiffs, and remand for consideration of the appropriate remedy in accordance with our opinion in *Rodriquez*. The district court should require that Lee Way consider these plaintiffs for road driver positions as vacancies occur, and the court should supervise closely the standards used by Lee Way in determining whether the drivers qualify for transfer. If any of the plaintiffs qualifies for a road driver position,[5] he should be awarded seniority carryover based on a "qualification-date" formula. See Bing v. Roadway Express, Inc., 5 Cir. 1973, 485 F.2d 441, 451. That Lee Way did not acquire a road driver terminal in San Antonio until 1966 is irrelevant to the proper computation of seniority. No hardship will be inflicted upon Lee Way or the union defendants by adjusting the plaintiffs' seniority to dates prior to the time Lee Way domiciled road drivers in San Antonio. To the extent that returning these drivers to their "rightful

3. The operation of no-transfer policies and separate seniority rosters is fully described in Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40.

4. William Blood, Director of Personnel for Lee Way testified that the company had undertaken recently an affirmative action program to increase its hiring of minority road drivers. While we find this program commendable, it does not excuse either Lee Way's past record or its present practices with regard to minority city drivers locked into their jobs by their inability to transfer seniority. See Rowe v. General Motors Corp., 5 Cir. 1972, 457 F.2d 348, 356.

5. We note that John Reaves, terminal manager for Lee Way in San Antonio, testified that in his opinion Resendis is qualified as a road driver and that Gonzales "could probably qualify" as a road driver.

place" works a hardship at all, it will work it on those white drivers for Lee Way who will find their seniority expectations altered. But, as the Court said in United States v. Bethlehem Steel Corp., 2 Cir. 1971, 446 F.2d 652, 663: "Assuming *arguendo* that the expectations of some employees will not be met, their hopes arise from an illegal system. Moreover, their seniority advantages are not indefeasibly vested rights but mere expectations derived from a bargaining agreement subject to modification." See also Vogler v. McCarthy, Inc., 5 Cir. 1971,

451 F.2d 1236, 1238-1239. If Resendis, Escobedo, or Gonzales proves qualified to transfer to the road, he should be awarded back pay. See Pettway v. American Cast Iron Pipe Co., 5 Cir. 1974, 494 F.2d 211, 251-263; Johnson v. Goodyear Tire & Rubber Co., 5 Cir. 1974, 491 F.2d 1364, 1376-1380; Bing v. Roadway Express, Inc., 485 F.2d at 452-455.

[8] Arturo Rodriguez served as a line driver for Lee Way in San Antonio until he was fired on October 29, 1972. The district court found that Lee Way discharged Rodriguez "because of a poor driving record involving at least two accidents within the one year period immediately preceding his dismissal." Rodriguez's dismissal was upheld through union grievance procedures. He introduced no convincing evidence at trial that his dismissal was in any way improper. We conclude that the district court's finding of no discrimination in Rodriguez's dismissal is supported in the record.

[9] Nor can we disagree with the district court's finding that Wilburn White failed to prove a case of discrimination against him by any of the defendants. White began working as a city driver in a "casual" status in 1967. He complains that Lee Way has refused to accord him

"regular" status because he is a Negro. But in 1967, when White first began driving for Lee Way, there were four Negro city drivers on "regular" status. Since 1967 Lee Way has hired seven regular city drivers—four Mexican-American, one anglo, and two Negro. These statistics establish no prima facie case of discrimination against blacks by Lee Way in its hiring of city drivers in San Antonio.[6] Moreover, there was testimony at trial that White had suffered in the past from an "attitude problem." Although there was also testimony that White's attitude had improved, this factor alone provides an insufficient basis to doubt the correctness of the district court's finding that none of the defendants discriminated against White.[7]

Affirmed in part; reversed in part, and remanded.

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6. Compare Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40 and the cases cited there, 505 F.2d at 54 and n. 17.

7. Even White himself seems unsure that his inability to obtain a regular city driving job is the result of racial, rather than personal, animus. The following colloquy took place at trial during White's cross-examination:

> Q. Now, have you ever told Mr. Shafer down at the Union that Lee Way has been discriminating against you personally?
>
> A. Yes, sir.
>
> Q. And did you tell him that the way you felt they were discriminating against and was because they weren't giving you as an individual a job?
>
> A. As an individual?
>
> Q. Yes, sir, give you, Wilburn White, a job.
>
> A. Yes. I told him that they could have given me more work. They could give me more work but they wasn't doing it.
>
> Q. You have never complained to Mr. Shafer of the Union about Lee Way discriminating against Negroes as a race, have you?
>
> A. No, sir.
>
> Q. Just against you personally?
>
> A. Yes, but I am a Negro.

APPENDIX C

In the District Court of the United States for the
Western District of Texas
San Antonio Division

Civil Action No. SA-71-CA-296

Ernest Herrera, et al.

v.

Yellow Freight System, Inc., et al.

Findings of Fact and Conclusions of Law

On the 22nd day of January, 1973, came on to be heard the above entitled and numbered cause for trial on the merits, and both parties appeared in person and by their Attorneys of Record and announced ready for trial, whereupon the Court proceeded to hear the evidence from the witnesses and oral arguments of counsel and at the conclusion of the trial and after consideration of all the pleadings, the evidence adduced by both parties, the arguments of counsel and applicable law, the Court hereby makes its Findings of Fact and Conclusions of Law.

Findings of Fact

1. This Court has jurisdiction of this action by virtue of Title 42, U.S.C., Section 2000e-5(f) and Title 28, U.S.C., Section 1343 (4) providing a cause of action under Title 42, U.S.C., Section 1981.

2. The plaintiffs are employees of the defendant truck line and members of the defendant Union and its affiliates (Local 657 of the Southern Conference of Teamsters

and the International Conference of Teamsters). Plaintiffs are all Mexican-American residents of the United States and residents of San Antonio, Bexar County, Texas. The defendant truck line is a corporation doing business in the State of Texas and the City of San Antonio and operates and maintains a local city-wide freight terminal and a city-wide trucking service in San Antonio, Bexar County, Texas and is an employer within the meaning of Title 42, U.S.C., Section 2000e-(b). The defendant Union and its affiliates are the representatives and bargaining agents of the plaintiff employees on an international, regional and local basis.

3. All plaintiffs were hired by the defendant truck line as regular city pick-up and delivery drivers on the dates set out herein and have remained in that capacity to the present time.

Ernest Herrera—July, 1965

Mario Melchor—October, 1964

Trine Uribe—October, 1964

4. It is stipulated that none of the plaintiff employees were discriminated against as to their original employment.

5. The defendant truck line does not have any road drivers domiciled in San Antonio, Bexar County, Texas and the San Antonio terminal is operated solely as a local, city-wide pick-up and delivery service.

6. On April 1, 1970 the defendant truck line and the defendant Union entered into the National Master Freight Agreement and Southern Conference Area Local Freight Forwarding Pick-up and Delivery Supplemental Agreement (hereinafter referred to as "Union Contract") which expires June 30, 1973 and the terms and conditions of

which are fully known and understood by the plaintiff employees. The plaintiff employees have ratified this contract and prior similar contracts since the time of their employment.

7. The provisions of the Union Contract providing for job transfer from a city driver to a road driver and vice versa, including the provision for separate seniority lists for city and line drivers, apply to all job applicants and employees regardless of race or qualifications.

8. The defendant truck line's policy and regulations regarding job transfers are generally:

(a) The applicant must relinquish his current position;

(b) The applicant must make written application for a new position at terminal location where the job is sought;

(c) The applicant must be willing to relocate at the new terminal location;

(d) For a road driver job, applicants must pass certain standardized Department of Transportation tests and company tests (driving and physical); and

(e) The applicants must have certain road driving experience.

These regulations are not unreasonable and apply to all job applicants and employees regardless of race or qualifications. The fact that each terminal is autonomous as concerns the employment of drivers is proper and in accordance with accepted business practices.

9. The plaintiff employees testified that they were unwilling or at least ambivalent to comply with the job

transfer requirements even when confronted with a hypothetical opportunity to make the job change under the existing regulations "tomorrow" assuming a position was available. Thus, plaintiffs' objections are not grounded on lack of job availability, but rather on the stringency of the regulations.

10. None of the plaintiffs have ever made written application for a position as road driver. Plaintiff Uribe's application is not considered to be in full compliance with regulations and company policy in applying for this position.

11. The defendant truck line employs a majority of Mexican-Americans and Negroes in all phases of its San Antonio Terminal operation and there has been no showing of discrimination as regards the hiring practices of that office.

12. The plaintiff employees have never filed a discrimination grievance charging a violation under Article 38 of the Union Contract, but originally filed a Complaint with the Equal Employment Opportunity Commission.

13. The plaintiff employees have never availed themselves of participating in the contract amendment negotiation meetings at the local Union level in an effort to change the job transfer requirements.

14. The plaintiff employees have not been discriminated against by their Union as the Union is comprised of a majority of Mexican-Americans and Negroes and every member is free to participate in the contract negotiating process and to vote on every issue or contract presented to the membership.

15. When the plaintiff employees inquired from various supervisory personnel at the San Antonio Terminal as

to the method of securing a road driving position, they were not discouraged nor misled, but rather the requirements were explained (i.e. they would have to make application at the road driving terminal location, etc.) and the plaintiffs chose not to make application. The failure of the plaintiff employees to secure a road driving position was due to a lack of diligence on their part, an unwillingness to give up their city driving seniority, and an inability to meet the job qualifications rather than actual racial discrimination by either the defendant truck line or the defendant Union.

16. None of the plaintiff employees could satisfy all of the qualifications for a road driver position according to the company manual due to age or weight or driving record. The qualifications apply universally to all job applicants and employees and are not in any manner racially discriminatory.

17. Both the defendant truck line and the Union defendants are bound by the contracts in that neither can unilaterally change the contract provisions by allowing a merger of seniority lists, a transfer of seniority or in any other manner attempting to alter, combine or discard the provisions of the separate contracts for city and road drivers without subjecting themselves to economic or other negative sanctions by the non-offending party.

18. Refusal by the defendant truck line to permit job transfers without loss of terminal seniority or to maintain separate seniority lists is a reasonable and proper business practice and in accordance with the Union Contract and in no manner causes, perpetuates or results in discriminatory practices by any of the defendants.

19. The fact that there are separate Union Contracts and job qualifications for city and road drivers is reasonable both as an accepted business practice and by the fact that the National Labor Relations Board recognizes the two job groups as separate bargaining units.

20. The defendant truck line did not prevent or discourage the plaintiff employees from seeking or securing a road job transfer nor from making written application for said position because of their race or because they filed a Complaint with the Equal Employment Opportunity Commission, or for any other reason.

21. The defendant truck line and Union did not discriminate against the plaintiff employees because they made a charge or indicated they would make a charge against the defendants to the Equal Employment Opportunity Commission.

22. The defendants did not discriminate against the plaintiffs or any other employee or Union member on the basis of race or otherwise.

23. While not compelling, further evidence of the continuing desire of the vast majority of the local Union membership is contained in the Affidavit of R. C. Shafer, President and Business Manager of the local Union, and George Hardeman, Jr., Recording Secretary of the local Union, filed February 23, 1973 and stipulated to by the parties to this suit by Stipulation filed March 6, 1973. The Affidavits show that at the Union Membership meeting on February 11, 1973, after the trial of this case was completed, the employees of the defendant truck line, and others, rejected proposals that the next City and road driver contracts be merged and that both job classifications be permitted to transfer to the other with company seniority for all purposes. A further proposal to the effect that the seniority of the employees working for the freight lines re-

main as it is in the current contracts was approved by a vote in excess of two to one.

Conclusions of Law

1. I conclude as a matter of law that none of the defendants violated Title 42, United States Code, Section 2000e-5 or any section of Title 42 relating to race discrimination.

2. I further conclude as a matter of law that the plaintiffs, and each of them, take nothing by reason of their suit and that the defendants and each of them are entitled to judgment.

3. I further conclude that the defendants, and each of them, recover their court costs incurred herein against the plaintiffs.

Entered this 22nd day of March, 1973, at San Antonio, Texas.

/s/ John H. Wood, Jr.
United States District Judge

APPENDIX D

66

Ernest HERRERA et al., Plaintiffs-Appellants,

v.

YELLOW FREIGHT SYSTEM, INC., et al.,
Defendants-Appellees.

No. 73-2254.

United States Court of Appeals,
Fifth Circuit.

Nov. 25, 1974.

Mexican-American city truck drivers brought employment discrimination action challenging motor carrier's "no-transfer" policy and maintenance of separate seniority rosters for city and road drivers, which conduct allegedly resulted in plaintiffs being discriminatorily "locked-in" to

67

their city driver jobs without realistic opportunity for transfer to higher paying road job positions. The United States District Court for the Western District of Texas, John H. Wood, Jr., J., found no discrimination and plaintiffs appealed. The Court of Appeals, Wisdom, Circuit Judge, held that plaintiffs established prima facie case of discrimination perpetuated by racially neutral "no-transfer" and "no-seniority-carryover" policies of carrier and union organizations, and that discriminatory effects of policies was not justified on ground of business necessity.

Reversed and remanded.

Ruben Montemayor, Harry A. Nass, Jr., San Antonio, Tex., for plaintiffs-appellants.

Theo F. Weiss, San Antonio, Tex., Paul Scott Kelly, Raymond F. Beagle, Jr., Kansas City, Mo., for Yellow Freight.

Edward W. Penshorn, Bradford F. Miller, San Antonio, Tex., for Local 657.

Hal K. Gillespie, G. William Baab, Dallas, Tex., for So. Conf. of Teamsters.

Before WISDOM, AINSWORTH and GODBOLD, Circuit Judges.

WISDOM, Circuit Judge:

This is an action brought under Title VII of the Civil Rights Act of 1964 by three Mexican-American city drivers employed by the defendant Yellow Freight System, Inc. The plaintiffs contend that the company defendant's past discrimination in the hiring of road drivers has been perpetuated by the company's no-transfer policy and by the maintenance of separate seniority rosters for road and city drivers without provision for seniority carryover by the defendant unions. As a result of these policies, the plaintiffs argue, they have been discriminatorily "locked in" their city driver jobs without any realistic opportunity to transfer to a higher paying road job position. The district court found no discrimination. On the authority of Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40, decided today, we reverse.

In almost every respect this suit is a carbon copy of *Rodriquez,* except that *Rodriquez* was a class action while this is brought only on behalf of the individual plaintiffs. The plaintiffs here work as city drivers in Yellow Freight's San Antonio terminal. Like East Texas Motor Freight,

Yellow Freight domiciles no road drivers in San Antonio.

Like East Texas Motor Freight, Yellow Freight's history of road-driver hiring is heavily tainted by discriminatory exclusion of minority drivers.[1] And like East Texas Motor Freight, Yellow Freight, and the unions, have hindered the transfer of city drivers to road driver jobs by a no-transfer policy and the maintenance of separate seniority rosters. This case was brought before the same district judge that heard *Rodriguez* a few days later. Similar to its finding in *Rodriguez,* the court found that none of the plaintiffs "could satisfy all the qualifications for a road driver position according to the company manual due to age or weight or driving record". The court concluded that "[t]he defendants did not discriminate against the plaintiffs or any other employee or Union member on the basis of race or otherwise".

[1, 2] The defendants here advance many of the same arguments in support of the district court's conclusion that the defendants advanced in *Rodriguez,* and again we reject them. It is our considered view that the plaintiffs established a prima facie case of hiring discrimination perpetuated by the racially neutral no-transfer and no-seniority-carryover policies of Yellow Freight, Local 657, and the Southern Conference.[2] The discriminatory effect of these policies was not justified by a showing of business necessity. The district court's finding of no discrimination, therefore, is erroneous.

[3] Because this is not a class action, we pause to amplify our discussion in *Rodriguez* of McDonnell Douglas

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1. Yellow Freight responded to the plaintiffs' interrogatories by stating that it employed 50 line drivers at Dallas and 46 line drivers at Amarillo. Yellow Freight employed no Mexican-American line drivers at either terminal until after the complaint was filed in this suit.

2. Because the separate seniority lists originate at the Southern Conference level, we find no violation of Title VII by the defendant Teamsters International.

Corp. v. Green, 1973, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668. In *McDonnell Douglas* the Court outlined the following test for a complainant in a Title VII action:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802, 93 S.Ct. at 1824. The defendants argue here that *McDonnell Douglas* must control. In *Rodriguez* we distinguished *McDonnell Douglas* on three grounds. Rodriguez was a class action; there was a history of hiring discrimination sufficient to make application for a road driving job a futile exercise; and the plaintiffs had been denied the opportunity to show that they were qualified to become road drivers, because they had not been given a road test. Although the instant case is not a class action, we are of the view that McDonnell Douglas is distinguishable on the other two grounds. Here there is a history of past hiring discrimination, and, as in *Rodriguez*, the plaintiffs had no opportunity to take a road test and thus to prove their qualifications.[3]

We reverse and remand to the district court for consideration of the remedy question in light of *Rodriguez*.

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3. Jim Norman, road operations manager for Yellow Freight at its Baxter Springs, Kansas, terminal, testified that he would consider a line driver qualified only after personally testing the driver in the equipment and checking his knowledge of safety requirements.

APPENDIX E

In the District Court of the United States
For the Western District of Texas
San Antonio Division

Civil Action No. SA-71-CA-302

Jesse Rodriguez, et al.,

v.

East Texas Motor Freight, et al.

Findings of Fact and Conclusions of Law

On the 29th day of January, 1973, came on to be heard the above entitled and numbered cause for trial on the merits, and both parties appeared in person and by their Attorneys of Record and announced ready for trial, whereupon the Court proceeded to hear the evidence from the witnesses and oral arguments of counsel and at the conclusion of the trial and after consideration of all the pleadings, the evidence adduced by both parties, the arguments of counsel and applicable law, the Court hereby makes its Findings of Fact and Conclusions of Law.

Findings of Fact

1. This Court has jurisdiction of this action by virtue of Title 42, U.S.C., Section 2000e-5(f) and Title 28, U.S.C., Section 1343 (4) providing a cause of action under Title 42, U.S.C., Section 1981.

2. The plaintiffs are employees of the defendant truck line and members of the defendant Union and its affiliates

(Local 657 of the Southern Conference of Teamsters and the International Conference of Teamsters), with the exception of the plaintiff, Jesse Rodriguez, who is no longer an employee of the defendant truck line. Plaintiffs are all Mexican-American residents of the United States and residents of San Antonio, Bexar County, Texas. The defendant truck line is a corporation doing business in the State of Texas and the City of San Antonio and operates and maintains a local city-wide freight terminal and a city-wide trucking service in San Antonio, Bexar County, Texas and is an employer within the meaning of Title 42, U.S.C., Section 2000e-(b). The defendant Union and its affiliates are the representatives and bargaining agents of the plaintiff employees on an international, regional and local basis.

3. All plaintiffs were hired by the defendant truck line as regular city pick-up and delivery drivers on the dates set out herein and have remained in that capacity to the present time.

Jesse Rodriguez—Sept. 1965

Modesto Herrera—May, 1965

Sadrach Perez—May, 1959

4. It is stipulated that none of the plaintiff employees were discriminated against as to their original employment.

5. Except for one road driver employed by the Valley Copperstate Sunset Lines, who was transferred from San Antonio, Texas immediately after the merger in 1970 with East Texas Motor Freight, the defendant truck line has never had any road drivers domiciled in San Antonio, Bexar County, Texas and the San Antonio terminal is operated solely as a local, city-wide pick-up and delivery service.

6. It is stipulated that prior to and subsequent to the effective date of Title VII of the 1964 Civil Rights Act to the date that Jesse Rodriguez filed a charge of discrimination with the Equal Employment Opportunity Commission (E.E.O.C.) the defendant truck line had never employed a Negro or Mexican-American as a line driver in the State of Texas covered by the Southern Conference Area Supplemental Agreement.

7. It is stipulated that except for having been received and filed locally by the Terminal Manager Sager in August 1970, the defendant truck line has never considered the written applications for employment as road drivers of the plaintiffs. Such applications were transmitted to the Dallas corporate office of the defendant truck line subsequent to the filing of the E.E.O.C. charges involved herein.

8. It is stipulated that the claim of discrimination of the plaintiffs is solely based upon the fact that after their original employment they have been "locked in" to the lower paying job of city driver and have been denied a job as road driver because:

(a) of the maintenance of separate seniority rosters for city and road drivers;

(b) of the fact that any city driver, regardless of his race, if he transferred from city driver classification to a road driver classification, loses his accumulated city seniority;

(c) the defendant truck line discouraged inquiries from the plaintiffs concerning the qualifications and/or availability of road driver jobs;

(d) the defendant truck line had always employed Anglo/white applicants as road drivers; and

(e) the defendant truck line's policy and practice has been based to a great extent on a word of mouth system. Since the defendant truck line's road drivers and supervisory and terminal personnel are almost exclusively Anglo/white, such a practice has continued the alleged illegal exclusion of Mexican-Americans and Negroes as road drivers.

9. It is further stipulated that the only issue presently before the Court pertaining to the defendant truck line is whether or not its failure to consider the plaintiffs' road driver applications constituted a violation of Title VII and 42 U.S.C., Section 1981.

10. On April 1, 1970 the defendant truck line and the defendant Union entered into the National Master Freight Agreement and Southern Conference Area Local Freight Forwarding Pick-up and Delivery Supplemental Agreement (hereinafter referred to as "Union Contract") which expires June 30, 1973 and the terms and conditions of which are fully known and understood by the plaintiff employees. The plaintiff employees have ratified this contract and prior similar contracts since the time of their employment, with the exception of Jesse Rodriguez who voted against ratification of the current contract solely because of the strike and lock-out by the Chicago bargaining unit in the Spring of 1970 and not due to any contract clause made the subject of this suit.

11. The provisions of the Union Contract providing for job transfer from a city driver to a road driver and vice versa, including the provision for separate seniority lists for city and line drivers, apply to all job applicants and employees regardless of race or qualifications, and are not in any way discriminatory.

12. The defendant truck line's policy and regulations regarding job transfers are generally:

(a) The applicant must relinquish his current position;

(b) The applicant must make written application for a new position at terminal location where the job is sought;

(c) The applicant must be willing to re-locate at the new terminal location;

(d) For a road driver job, applicants must pass certain standardized Department of Transportation tests and company tests (driving and physical); and

(e) The applicants must have certain road driving experience.

These regulations are not unreasonable and apply to all job applicants and employees regardless of race or qualifications. It is stipulated that the standards and qualifications of the defendant truck line for its road drivers are not discriminatory. The fact that each terminal is autonomous as concerns the employment of drivers is proper and in accordance with accepted business practices.

13. The plaintiff employees testified that they were unwilling or at least ambivalent to comply with the job transfer requirements even when confronted with a hypothetical opportunity to make the job change under the existing regulations "tomorrow" assuming a position was available. Thus, plaintiffs' objections are not grounded on lack of job availability but rather on the stringency of the regulations.

14. There has been no showing of discrimination as regards the hiring practices of the San Antonio Terminal office of the defendant truck line.

15. The plaintiff employees have never filed a discrimination grievance charging a violation under Article 38 of the Union Contract, but originally filed a Complaint with the Equal Employment Opportunity Commission.

16. The plaintiff employees have never availed themselves of participating in the contract amendment negotiation meetings at the local Union level in an effort to change the job transfer requirements.

17. The plaintiff employees have not been discriminated against by their Union. The Union is comprised of a majority of Mexican-Americans and Negroes and every member is free to participate in the contract negotiating process and to vote on every issue or contract presented to the membership.

18. When the plaintiff employees inquired from various supervisory personnel at the San Antonio Terminal as to the method of securing a road driving position, they were not discouraged nor misled, but rather the requirements were explained (i.e. they would have to make application at the road driving terminal location, etc.). The failure of the plaintiff employees to secure a road driving position was due to an unwillingness to give up their city driving seniority and an inability to meet the job qualifications rather than actual racial discrimination by either the defendant truck line or the defendant Union.

19. In January, 1972, the company made the following modification in its no-transfer policy: during a period of 30 days at any terminal where line drivers were domiciled, a city driver could make application for transfer to

a line driver's job. He would be given the necessary tests and if he qualified, as a road driver job opened up or became available, he would be permitted to take the job. In effect, the requirement of three years immediate prior line haul road experience was temporarily waived as to such city drivers.

In the area covered by the Southern Conference of Teamsters, there were 202 applications by city drivers. Some of them failed to qualify or to pass the required tests. Some qualified, but did not like over-the-road driving and voluntarily went back to city driving. In the end, only five city drivers successfully made the transition or transfer to over-the-road drivers' jobs. All five of these worked out of the Memphis, Tennessee, terminal.

20. The plaintiff, Jesse Rodriguez, continues in his employment with the defendant truck line as a city driver. His driving and work record includes numerous accidents (at least three) and at least five injuries.

21. The plaintiff, Modesto Herrera, continues in his employment with the defendant truck line as a city driver. His driving and work record includes at least three accidents, at least seven injuries, much time off because of injuries, and at least four warning letters, three of which involved abnormally low productivity.

22. The plaintiff, Sadrach G. Perez, was employed by the defendant truck line as a city driver until his discharge for cause on May 18, 1971. His driving and work record included the following:

(1) On January 18, 1966 he claimed to have been totally and permanently disabled in an accident in which he hurt his back stacking boxes. In June of 1966 he filed suit in the District Court of Bexar

County, Texas, appealing from an award of the Industrial Accident Board and alleging that he was "totally and permanently incapacitated". On July 27, 1966 this suit was voluntarily dismissed. There was no settlement with or payment by ETMF's compensation carrier.

(2) On October 22, 1970 Sadrach G. Perez was given a warning letter by the then terminal manager for violating instructions and a long-standing policy of the terminal.

(3) On January 28, 1971 Perez was dispatched with a shipment to Lackland Air Force Base. The shipment included 471 pieces, totaling 5,133 lbs., with most of the pieces weighing around 11 lbs. and no piece weighing more than 25 lbs.

He complained to the Assistant Terminal Manager Ezra Beierle that the truck in which the merchandise was loaded did not have a lift gate and wanted to unload the merchandise onto a truck that did have a lift gate. Beierle refused, telling him to proceed with the delivery.

Perez then went to the office of Terminal Manager Asbury and demanded that the truck be unloaded and the merchandise loaded onto one having a lift gate. The argument consumed about 20 minutes. Asbury told him to proceed with the delivery. Perez left with the statement, "I've been too good too long."

He proceeded to Lackland where he took a total of five hours to deliver 5,133 lbs. at one location.

He was given a written reprimand and warning because of the incident.

(4) A few days later, he filed a Workmen's Compensation claim asserting that on the Lackland delivery on January 28, 1971 he injured his left shoulder and upper back and neck.

(5) On January 29, 1971 he was given a written warning notice because of partial absences from work on January 26, 27 and 28.

(6) On March 26, 1971 he was given a warning notice because of his failure to make a delivery on March 24, 1971 at Solo Serve, the warning notice citing other instances in February, 1971 of poor production by him.

(7) On March 26, 1971 he was given a warning notice in connection with a delivery at Sonney Plumbing and Air Conditioning Company. He had unloaded the merchandise on the ground. When the lady in charge, Mrs. Mary Fewell, asked him to place it on the dock, he refused, claiming that the stacking of the merchandise on the ground completed the delivery. Mrs. Fewell wrote a letter to the company protesting the fact that Perez was disrespectful and discourteous to her.

(8) On May 18, 1971 Perez was dispatched with a load of drugs to the Scobey Warehourse. The boxes had been segregated by numbers in the trailer at the point of origin (Chicago). The instructions to Perez were that he was to load them on pallets at the Scobey Warehouse according to the instructions.

Perez became involved in an argument with the Scobey supervisor about how the pallets were to be delivered to him. Assistant Manager Beierle made a trip to Scobey's to attempt to solve the problems which Perez had created.

Terminal Manager Asbury and Beierle made another trip to Scobey's attempting to solve the problems.

Finally, about 2:45 P.M., Asbury received a call from Chicago in which the shipper complained about the way its merchandise was being handled at Scobey's, Scobey's having apparently reported to the shipper. Perez was ordered to lock the trailer and return to the terminal, where he was discharged by Asbury.

(9) Local Union No. 657 filed a grievance in connection with the discharge which eventually reached arbitration and was heard by the Joint Committee at a meeting in Biloxi, Mississippi. After a full hearing, the committee decided in favor of the company and against Perez (and the Union). At the hearing, evidence was introduced that more than ten (10) customers of the company had given instructions not to send Sadrach Perez back to their places of business, stating that they would refuse the freight if it was to be delivered and would not give up freight if he was to pick it up.

(10) On July 19, 1971 Perez filed a charge with the National Labor Relations Board against the International Brotherhood of Teamsters alleging a violation of the act in its failure to properly represent him. The Regional Director declined to issue a complaint. Perez appealed to the General Counsel who denied the appeal. Represented by counsel, Perez has a current claim pending before the Industrial Accident Board arising out of the 1971 alleged accident in which he claims that he is totally and permanently disabled, claiming to have a bad back.

23. None of the plaintiff employees could satisfy all of the qualifications for a road driver position according to the company manual due to age or weight or driving record. The qualifications apply universally to all job applicants and employees and are not in any manner racially discriminatory.

24. The driving, work, and/or physical records of the plaintiffs are of such nature that only casual consideration need be given to determine that the plaintiffs cannot qualify to become road drivers. The failure of the defendant truck line to proceed with a detailed, comprehensive consideration of the plaintiffs' applications was for valid business reasons and not because of any discrimination against any of the plaintiffs because of their race or national origin.

25. Both the defendant truck line and the Union defendants are bound by the contracts in that neither can unilaterally change the contract provisions by allowing a merger of seniority lists, a transfer of seniority or in any other manner attempt to alter, combine or discard the provisions of the separate contracts for city and road drivers without subjecting themselves to economic or other negative sanctions by the non-offending party.

26. Refusal by the defendant truck line to permit job transfers without loss of terminal seniority or to maintain separate seniority lists is a reasonable and proper business practice and in accordance with the Union Contract and in no manner causes, perpetuates or results in discriminatory practices by any of the defendants.

27. The fact that there are separate Union Contracts and job qualifications for city and road drivers is reasonable both as an accepted business practice and by the fact

that the National Labor Relations Board recognizes the two job groups as separate bargaining units.

28. The defendant truck line did not prevent or discourage the plaintiff employees from seeking or securing a road job transfer nor from making written application for said position because of their race or because they filed a Complaint with the Equal Employment Opportunity Commission, or for any other reason.

29. The defendant truck line and Union did not discriminate against the plaintiff employees because they made a charge or indicated they would make a charge against the defendants to the Equal Employment Opportunity Commission.

30. The defendants did not discriminate against the plaintiffs or any other employee or Union member on the basis of race or otherwise.

31. Plaintiffs have at no time moved for a prompt determination of the question of whether or not this cause of action should be maintained as a class action and have offered no credible proof on the question.

32. Plaintiffs have offered no proof of liability or damages as to any class, having confined the evidence, arguments and post trial brief to the individual claims of the named plaintiffs, and having stipulated at the commencement of trial that the only issue before this Court with respect to the defendant truck line involved its failure to consider the individual plaintiffs' applications for employment as road drivers.

33. While not compelling, further evidence of a continuing desire of the majority of the local Union membership is contained in the Affidavit of R. C. Shafer, President and Business Manager of the local Union, and George

Hardeman, Jr., Recording Secretary of the local Union, filed February 23, 1973. The parties have stipulated that, if called, these two men would testify that at the Union Membership meeting on February 11, 1973, after the trial of this case was completed, the employees of the defendant truck line, and others, rejected proposals that the next City and road driver contracts be merged and that both job classifications be permitted to transfer to the other with Company seniority for all purposes. A further proposal to the effect that the seniority of the employees working for the truck lines remain as it is in the current contracts was approved by a vote in excess of two to one.

Conclusions of Law

1. I conclude as a matter of law that none of the defendants violated Title 42, United States Code, Section 2000e-5 or any section of Title 42 relating to race discrimination.

2. I further conclude that this cause of action is not a proper one for class action and that, therefore, the class action claims in the Complaint should be, and the same are hereby, Dismissed.

3. I further conclude as a matter of law that the plaintiffs, and each of them, take nothing by reason of their suit and that the defendants and each of them are entitled to judgment.

4. I further conclude that the defendants, and each of them, recover their court costs incurred herein against the plaintiffs.

Entered this 22nd day of March, 1973, at San Antonio, Texas.

/s/ John H. Wood, Jr.
United States District Judge

APPENDIX F

40

Jesse RODRIGUEZ, Sadrach G. Perez and Modesto Herrera, on their own behalf and on behalf of those similarly situated, Plaintiffs-Appellants,

v.

EAST TEXAS MOTOR FREIGHT, Southern Conference of Teamsters and Teamsters Local 657, Defendants-Appellees.

No. 73-2801.

United States Court of Appeals, Fifth Circuit.

Nov. 25, 1974.

Mexican-American city truck drivers brought employment discrimination class action against motor carrier and union organizations challenging carrier's requirement that city drivers resign their jobs before applying for more lucrative road positions and rule preventing city drivers from carrying their seniority to road jobs. The United States District Court for the Western District of Texas, John H. Wood, Jr., J., found that class action was inappropriate and that defendants had not violated civil rights statutes and the plaintiffs appealed. The Court of Appeals, Wisdom, Circuit Judge, held that plaintiffs met class action requirements and could maintain action on behalf of carrier's Mexican-American and Negro city drivers who were included in collective bargaining agreement; that evidence that discrimination had been practiced in the past in hiring of road drivers, that "no transfer" policy and maintenance of separate seniority rosters for city and road drivers perpetuated the past discrimination and that

there was no business necessity precluding hiring of city drivers for road driver positions established that carrier had discriminated against plaintiffs and the plaintiff class; and that participation by union organizations in establishment of separate seniority rosters constituted violation of civil rights statutes.

Reversed and remanded.

45

Mario Obledo, Sanford Rosen, Mexican-Amer. Legal Defense & Educational Fund, Inc., San Francisco, Cal., Ed Idar, Jr., Jim Heidelberg, MALDEF, San Antonio, Tex., for plaintiffs-appellants.

Debra Millenson, EEOC, Washington, D. C., amicus curiae.

Theo. F. Weiss, San Antonio, Tex., Richard C. Hotvedt, Harry A. Rissetto, Washington, D. C., George E. Seay, William C. Strock, Dallas, Tex., for East Texas Motor Freight.

Edward W. Penshorn, Bradford F. Miller, San Antonio, Tex., for Teamsters Local Union 657.

G. Wm. Baab, L. N. D. Wells, Jr., Hal Gillespie, Dallas, Tex., for Southern Conference of Teamsters.

Before WISDOM, AINSWORTH and GODBOLD, Circuit Judges.

WISDOM, Circuit Judge:

In this employment discrimination case the plaintiffs-appellants attack two ubiquitous practices in the trucking industry: (1) the trucking companies' requirement that "city drivers" resign from their city driver jobs before applying for the more lucrative and sought-after "road" or "line driver"* positions, and (2) the companies' rule

*The terms "road driver" and "line driver" are used interchangeably throughout this opinion.

preventing city drivers from carrying their seniority to road driver jobs. The plaintiffs, Mexican-American city drivers for East Texas Motor Freight (ETMF), brought this action below as a class action, contending that these facially neutral practices of ETMF and the defendant union organizations perpetuate the effects of past discriminatory hiring practices and thus violate Title VII of the Civil Rights Act of 1964[1] and 42 U.S.C. § 1981.[2] The district court

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1. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

. . .

(e) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-2.

2. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981.

found that the cause of action was inappropriate for a class action, and that none of the defendants had violated Title VII or Section 1981. We reverse.

I.

Facts

In the trucking industry, "road" or "line driver" is considered a separate job classification from "city, pick-up and delivery driver". Road drivers for ETMF drive 10-speed tractors with semi-trailers, carrying freight among the 52 ETMF terminals in 19 states. Road drivers work long hours, and often spend long periods of time away from home, but they have the prestige driving job in the trucking industry, and they generally bring home the highest pay. Freight brought to a terminal by a road driver is unloaded and reloaded onto other trucks, either onto another tractor-trailer or onto a "bobtail", a truck with the body and engine mounted on the same chassis. A city driver then delivers the merchandise locally.

In conformance with the practice in the trucking industry generally, ETMF "domiciles" road drivers at only some of its terminals: those in cities that are relay points equidistant between major centers, and those in "head haul" cities, cities at the end of a line of service that generate a significant amount of freight to other points in the company's system. In Texas ETMF has six terminals that domicile road drivers, and fifteen terminals that do not.[3] ETMF has city drivers at all terminals.

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3. Those terminals domiciling road drivers are: Dallas, El Paso, Longview, Pecos, San Angelo, and Texarkana. Only city drivers are domiciled at the following terminals: Abilene, Amarillo, Atlanta, Austin, Beaumont, Brownwood, Ft. Worth, Henderson, Houston, Lubbock, Lufkin, Marshall, Odessa, San Antonio, and Tyler.

The primary responsibility for hiring drivers, both city and road, in the ETMF system rests with the manager at the terminal where a vacancy occurs. The manager interviews applicants, reviews their qualifications, and makes recommendations to officials at the corporate headquarters in Dallas. Although the Dallas officials must approve each applicant for employment, the terminal manager makes the affirmative decision to hire. The unions have no responsibility for hiring.

ETMF's qualifications for road drivers are more stringent than for city drivers. City drivers must be at least 21 years old and have at least one year pick-up and delivery experience. Road drivers must be at least 27 years old and have three years "immediate prior line haul road experience". Both city and road drivers face a battery of other requirements involving driving, work, credit, and police records. They must be familiar with Department of Transportation regulations, have a high school education or the equivalent, and hold a valid commercial drivers license. Finally, both city and road drivers must pass physical, written, and driving examinations. Everett E. Cloer, ETMF's Vice President in charge of industrial relations testified to the importance of driving tests for road drivers: "Well, first of all [applicants] are given a 25-mile driving test within the city to see if they can handle the transmissions of this equipment, see what their driving reactions are, et cetera. If they pass that, then they are given an in-cab trip with the supervisor. The supervisor rides with them on a student [over-the-road] trip."[4]

4. The importance of road testing as a criterion for hiring road drivers was echoed by Ed A. Asbury, Manager of ETMF's San Antonio terminal. When asked h[illegible] he would determine whether city drivers were qualified to be road drivers, he answered: "I think I should have to ride with those boys to be able to answer that question. I don't know . . . I would have

(Continued on following page)

Counsel for the parties stipulated that the line driver re-
47
quirements are nondiscriminatory.

City drivers and road drivers are covered by different collective bargaining agreements. The defendant-appellee Local 657 has a collective bargaining agreement with ETMF covering city drivers at ETMF's San Antonio terminal. Local 657 represents no road drivers of ETMF. The defendant-appellee Southern Conference of Teamsters, a delegate body of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, is made up of representatives from the affiliated Locals in ten southern states. Separate collective bargaining agreements for city and road drivers are drawn by the Southern Conference and negotiated by the Conference with trucking company representatives. Then the agreements are passed down to the Locals to be approved and made part of the contracts between the Locals and the trucking companies.

Since 1954 ETMF has followed a "no-transfer" policy, prohibiting the transfer of drivers between city and road driver classifications and between terminals.[5] Under the policy, in order for a city driver to obtain a position as a road driver, he must resign his city driver job and apply for a road driver slot. He thereby forfeits all accumulated seniority. In effect, he stands on no better footing

Footnote Continued—

to—if I were going to make an honest appraisal, I would get out and ride with that man. I would ride with him here in town, and I would ride with him on the freeway. I would ride with him in line haul equipment. I would see what he would do, how he conducted himself, how he handled his equipment."

5. Road drivers for ETMF presently operate under a "modified" terminal no-transfer policy. If a road driver at one terminal is laid off, he can "bump" a less-senior road driver at another terminal.

in applying for a road driver job than a complete stranger to the company. For the purposes of strengthening his application, he gains no "credit" for his years as a city driver. And if his bid to be a line driver fails, there is no guarantee that he will be rehired as a city driver. ETMF's policy against transfers is complemented by the fact that under collective bargaining contracts between ETMF and Local unions, including the defendant Local 657, city drivers who transfer to the road do not carry over their "competitive-status" seniority, that is, seniority for job bidding and lay off purposes.[6] Under separate collective bargaining agreements for road and city drivers, competitive-status seniority runs from the time an employee enters a particular collective bargaining unit. Transfer is not expressly prohibited, but it is not expressly permitted either, and the agreements have been universally interpreted to prohibit the carryover of seniority from one classification to another.

For thirty days in January and February 1972, to ease morale problems among its city drivers who wanted to become road drivers, ETMF relaxed its no-transfer policy and permitted city drivers to transfer to line jobs, if they could qualify.[7] During this period, although all other requirements were maintained, the requirement of three years line driving experience was waived. The modification did not affect the dual seniority system established by the separate collective bargaining agreements. Any city driver transferring to the road under the modified policy still lost his seniority for job bidding and lay off purposes. Moreover, the one-time-only change in policy opened the possibility of transfer only to those city drivers who worked out of terminals domiciling road drivers; the restrictions on interterminal transfers remained in effect. In the Southern Conference area 220 city drivers showed an interest in transferring under the temporary policy, and 35 to 50 city drivers tried out; five succeeded

6. The employee keeps his company seniority for fringe benefit purposes.

7. Road drivers were also permitted to transfer to the city.

48

in transferring to road driver jobs.[8]

Against the history of these policies must be juxtaposed one crucial set of facts. The parties stipulated that before 1970 East Texas Motor Freight had never employed a black or Mexican-American as a road driver in the Texas-Southern Conference area.[9] ETMF's road driver force in that area numbered approximately 180, all white/anglo drivers. After charges were filed by plaintiff Jesse Rodriguez with the Equal Employment Opportunity Commission (EEOC) on August 20, 1970, the company hired three Mexican-American road drivers in El Paso. By the time of trial, the company had still not hired a single black road driver in Texas. In comparison, approximately 35 percent of ETMF's city drivers in Texas are black or Mexican-American. Of a total of 575 city drivers for ETMF in the state, 111 are Spanish-surnamed, 95 are black, and 369 are anglo.

The three named plaintiffs, Jeese Rodriguez, Sadrach Perez, and Modesto Herrera, are Mexican-American city drivers at ETMF's San Antonio terminal. With the exception of one road driver who temporarily worked out of San Antonio in 1970, ETMF road drivers have never been domiciled in San Antonio. San Antonio city drivers were therefore not able to take advantage of the temporary

8. All five of the city drivers to make successful transition to road driver jobs worked out of the Memphis, Tennessee, terminal.

9. The Southern Conference covers all Teamster members in Texas, except for some in El Paso.

modification of the no-transfer rule in the winter of 1972. Perez was hired as a city driver in 1959, Herrera was hired in 1964, and Rodriguez was hired in 1965. They stipulated that they were employed at the San Antonio Terminal without regard to race, color, or national origin. Each is a member of Local 657 and the Southern Conference.

Although none of the named plaintiffs made written application for a line driver job until 1970, Herrera made verbal inquiries about transferring to the road as early as 1965. In 1970 the plaintiffs submitted letters to the San Antonio terminal manager, requesting transfer to road driving jobs. The terminal manager received and filed the letters. ETMF stipulated that it never considered these applications for employment as road drivers. On August 20, 1970, Rodriguez filed a written charge with the EEOC complaining that the policies of ETMF, Local 657, and the Southern Conference relegated Mexican-Americans and blacks to city driver jobs. Similar charges were filed by Herrera on March 11, 1971, and by Perez on June 7, 1971. On May 18, 1971, Perez was discharged from his employment with ETMF. The plaintiffs received thirty-day "right-to-sue" letters on October 11 and 13, 1971. On October 26, 1971, the plaintiffs filed this class action suit in district court.

Prior to the trial in this cause, the parties entered into a series of stipulations. In addition to the stipulations already mentioned, the parties agreed to the following:

> The claim of discrimination of the Plaintiffs is solely based upon the fact that after their original employment, they have been "locked in" to the lower paying job of city driver and denied a job as line driver because of:
>
> (a) The maintenance of separate seniority rosters for city and line drivers;

(b) The fact that any city driver regardless of his race, if he transferred from city driver classification to a road driver classification, loses his accumulated city seniority;

(c) The Defendant East Texas Motor Freight discouraged inquiries from Plaintiffs concerning the qualifications and/or availability of line driving jobs;

(d) The fact that the Defendant East Texas Motor Freight had always employed Anglo/white applicants as road drivers;

(e) That the company's policy and practice of recruiting line or road drivers has been based to a great extent on a word of mouth system. Since the company's line drivers and supervisory terminal personnel are almost exclusively Anglo/white, such a practice has continued the alleged illegal exclusion of Mexican-Americans and Negroes as road drivers;

That the only issue presently before the Court pertaining to the company is whether the failure of the Defendant East Texas Motor Freight to consider Plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C. § 1981.

Over strenuous objection at trial, the district court admitted evidence relating to the qualifications of the named plaintiffs to be road drivers. After trial, the court concluded that none of the named plaintiffs could satisfy all of the road driver requirements "according to the company manual due to age or weight or driving record". Furthermore, the court found, "[t]he driving, work, and/or physical records of the plaintiffs are of such nature

that only casual consideration need be given to determine that the plaintiffs cannot qualify to become road drivers". In conclusion, the court found that "[t]he defendants did not discriminate against the plaintiffs or any other employee or union member on the basis of race or otherwise". The plaintiffs appeal. The Equal Employment Opportunity Commission, as amicus curiae, has filed a brief urging reversal of the decision of the district court.

II.

The Class Action Claim

The plaintiffs brought this suit "on their own behalf and on behalf of other Mexican-American and black individuals who similarly have been denied equal employment opportunities by the defendants and additionally on behalf of Mexican-American and black individuals who may, in the future, be denied equal employment opportunities by the defendants because of their national origin and race". They described the class more particularly as "all of defendant East Texas Motor Freight's Mexican-American and black in-city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas . . . [and as] all Mexican-American and black applicants for line driver positions with East Texas Motor Freight included in the above area covered by the Southern Conference of Teamsters from July 2, 1965, to the present". Neither the plaintiffs nor the defendants moved for a ruling under Fed.R.Civ.P. 23(c)(1) as to whether the suit could be maintained as a class action, and the court made no ruling until after the trial was completed. In its findings the court stated:

31. Plaintiffs have at no time moved for a prompt determination of the question of whether or not this cause of action should be maintained as a class action and have offered no credible proof on the question.

32. Plaintiffs have offered no proof of liability or damages as to any class, having confined the evidence, arguments and post trial brief to the individual claims of the named plaintiffs, and having stipulated at the commencement of trial that the only issue before this Court with respect to the defendant truck line involved its failure to consider the individual plaintiffs' application for employment as road drivers.

Concluding that the cause of action was "not a proper one for class action", the court dismissed the class action claims. In our opinion, the district court's dismissal of the class action was erroneous.

[1] Rule 23(c)(1) provides that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained". A class action may not be dis-

missed because the class representatives fail to ask for a ruling on the propriety of the class nature of the suit. That responsibility falls to the court. "The court has an independent obligation to decide whether an action brought on a class basis is to be maintained even if neither of the parties moves for a ruling under subsection (c)(1)". Wright & Miller, Federal Practice and Procedure, Civil § 1785 (1972).

[2-5] The plaintiff class representatives, of course, must establish that the action meets the requirements of

Rule 23(a).[10] See Rossin v. Southern Union Gas Co., 10 Cir. 1973, 472 F.2d 707, 712; Johnson v. Georgia Highway Express, Inc., 5 Cir. 1969, 417 F.2d 1122, 1125 (Godbold, J., concurring); 3B J. Moore, Federal Practice ¶ 23.02-2 (2d ed. 1974); Wright & Miller, Civil § 1759 at 578. But the requirements of Rule 23(a) must be read liberally in the context of suits brought under Title VII and Section 1981. See Wright & Miller, Civil § 1771. Suits brought under these provisions are inherently class suits. By definition, discrimination on the basis of race or national origin is a class wrong. Oatis v. Crown Zellerbach Corp., 5 Cir. 1968, 398 F.2d 496, 499. And a suit charging employment discrimination is naturally "a sort of class action for fellow employees similarly situated". Jenkins v. United Gas Corp., 5 Cir. 1968, 400 F.2d 28, 33; see Parham v. Southwestern Telephone Co., 8 Cir. 1970, 433 F.2d 421, 428; cf. Newman v. Piggie Park Enterprises, 1968, 390 U.S. 400, 401-402, 88 S.Ct. 964, 19 L.Ed.2d 1263. When class relief is sought in the complaint, therefore, the court should liberally apply the requirements of Rule 23(a). See Bing v. Roadway Express, Inc., 5 Cir. 1973, 485 F.2d 441, 446; compare Danner v. Phillips Petroleum Co., 5 Cir. 1971, 447 F.2d 159, 164 (class relief not sought in complaint).[11]

[6] There is no serious dispute that the plaintiffs here satisfied the first three criteria in Rule 23(a). The

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10. (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23.

11. In *Danner* this Court expressly limited its holding: "All we hold is that class action relief must be predicated upon a proper class action complaint satisfying all the requirements of Rule 23". 447 F.2d at 164 n. 10.

class clearly meets the requirements that the members be so numerous that joinder would be impractical, that there are common questions of law and fact, and that the claims and defenses of the representative parties are typical. The defendants argue strenuously, however, that there was insufficient guarantee that the named parties would "fairly and adequately protect the interests of the class".

The defendants maintain that the named plaintiffs have acted antagonistically to the interests of a majority of Mexican-American and black city drivers. The complaint requests that the court order the city and line driver seniority lists merged to create a single seniority system based solely on the date that an employee first joined the company. The desirability of such relief, argue the defendants, was expressly rejected at a membership meeting of the defendant Local 657 on February 11, 1973, approximately two weeks after the completion of the trial. An affidavit recounting the results of voting at the meeting was admitted into evidence under Fed.R.Civ.P. 59. At the meeting the union members voted 87 to 21 against a proposal that the city and road driver contracts be merged and that city drivers be permitted to transfer to the road while road drivers were permitted to transfer to the city. Of the 138 people present at the meeting, 121 were city

pick-up and delivery drivers. Eighty-three were Mexican-American, 42 were Anglo, and 13 were Negro. If all possible Anglo votes were deducted from the total against it, the proposal still would have been rejected by a majority of Mexican-American and Negro votes.

We do not ascribe the significance to the vote that the defendants urge. We cannot tell what assumptions were made implicit. Furthermore, the membership of Local 657, even the Mexican-American and black membership, is far

from congruent with the class described in the complaint. The Local's membership is both more restricted and more extensive. The Local draws its membership from the San Antonio area; the complaint covers city drivers throughout Texas. The Local has members who work for trucking firms other than ETMF; the class outlined in the complaint is restricted to employees or applicants of ETMF. The extent to which the vote represents the actual preference of the class, therefore, is unclear.

[7-9] Even taking the results of the vote at face value,[12] we reject the district court's conclusion that there was sufficient reason to dismiss the class action in this case. Especially in light of the fact that the evidence of the union vote was not received until two weeks after the trial, there were two preferable options open to the trial judge. First, he could have shaped the class to remove any possible antagonism between the representatives and some of the city drivers. The court could have narrowed the class or separated it into subclasses for purposes of relief. See Oatis v. Crown Zellerbach Corp., 398 F.2d at 499. Or, the court could have shaped the relief to avoid any injustice to the dissenting class members. District courts have wide discretion in fashioning relief under Title

12. The outcome of the vote is consistent with what one might expect of a vote of ETMF's San Antonio city drivers. Separate seniority rosters in separate contracts prevent laid-off road drivers from bumping less senior city drivers from their jobs. Because ETMF does not domicile road drivers in San Antonio, to take advantage of a merger of seniority rosters and obtain a road job, a San Antonio city driver with ETMF would have to move to another city. Those city drivers who would not desire such a move, or who would not desire to transfer to the road for some other reason, would not gain from a merger of seniority rosters. We note that in a similar case a court has recently refused to order a merger of seniority rosters because to do so would injure those members of the plaintiff class who did not wish to transfer to road driving jobs. Sabala v. Western Gillette, Inc., S.D.Ky.1973, 362 F.Supp. 1142, 1153.

VII, Franks v. Bowman Transportation Co., 5 Cir. 1974, 495 F.2d 398, 414; Bing v. Roadway Express, Inc., 485 F.2d at 448-449. And flexibility and careful tailoring of judicial decrees in Title VII cases are the order of the day. See, e. g., Sabala v. Western Gillette, Inc., S.D. Tex. 1973, 362 F.Supp. 1142. The disagreement here concerned only the proper remedy; there was no antagonism with regard to the contention that the defendants practiced discrimination against the plaintiff class. We do not believe that disagreement within the class as to the remedy desired, surfacing so late in the litigation, should have resulted in a dismissal of the class action.

Because the trial was completed before the court made a ruling whether the class action could be maintained, there were involved none of the imponderables that make the decision so difficult early in litigation, and that demand a substantial amount of district court discretion and corresponding appellate deference. See Johnson v. Georgia Highway Express, Inc., 417 F.2d at 1123. We have before us a record of the proceedings, completed as a class action, and we can judge for ourselves the possible effects of any antagonism of interests. We find these effects insubstantial and curable. We conclude that the plaintiffs met the requirements of Rule 23(a) and established a proper class action under Fed.R.Civ.P. 23(b)(2).[13]

13. (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . .

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

Fed.R.Civ.P. 23.

52

[10, 11] The district court's finding that the plaintiffs offered no proof on the question of liability or damages to any class is clearly erroneous. As we describe more fully below, the plaintiffs entered into evidence statistics sufficient to present a prima facia case of past hiring discrimination, transmitted into the present by the no-transfer rule and separate seniority rosters which "lock" employees into city driver positions and prevent their transfer to road driver status. The plaintiffs further submitted, without objection, detailed information pertaining to all ETMF city drivers including their names, seniority dates, and domiciles. It is true, as the district court noted, that the plaintiffs concentrated at trial on the individual claims of the named plaintiffs. But the plaintiffs were not required to present more than a prima facie case of discrimination against the class. Nor did the plaintiffs effectively abandon their class claims by stipulating that "the only issue presently before the Court pertaining to the company is whether the failure of the Defendant East Texas Motor Freight to consider Plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C. § 1981". The stipulation was apparently entered in an attempt to eliminate some confusion in the exposition of evidence at trial, not to foreclose the class issues. The plaintiffs continued to proceed as in a class action. And this was made clear to the trial court and the defendants.[14]

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14. The following colloquy took place between the trial judge and Mr. Heidelberg, counsel for the plaintiffs:

THE COURT:

I assume, this being a matter before the court, that Mr. Heidelberg probably has in mind using this witness to establish a general practice and to show that this man was similarly treated although he may have no personal complaint. It would merely corroborate the testimony that such a practice exists. For that limited purpose—

(Continued on following page)

[12] To the extent that the district court's finding that the plaintiffs failed "to offer proof of liability or damages as to any class" refers to the class of "all Mexican-American and black applicants for line driver positions with East Texas Motor Freight", the finding is not erroneous. The plaintiffs never pursued the action on behalf of these individuals, and the district court's dismissal of the class action on their behalf was proper. On remand, the class considered for relief should be defined as all of East Texas Motor Freight's Mexican-American and black city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas.

Footnote Continued—

MR. HEIDELBERG:

For that purpose and also, Your Honor, it has not been established that this is not a class action. The allegation is made in the complaint and there have been no motions filed. The answers of the defendants deny that this is a class action, but of course we maintain that there is class action involved.

THE COURT:

Well, are you contending now as far as this trial is concerned that this is a class action?

MR. HEIDELBERG:

Yes, Your Honor.

THE COURT:

And how many people are you going to try to establish this by?

MR. HEIDELBERG:

As outlined in the complaint, Your Honor, the class would consist of the Mexican-American and black city drivers who are located in the State of Texas covered by the jurisdiction of the Southern Conference Supplemental Agreement.

III.

Liability

In the last few years we have seen a large number of suits brought in federal court, attacking facially neutral policies which allegedly discriminate against minority city

drivers by perpetuating patterns of discrimination in the hiring of line drivers by private firms in the trucking industry.[15] As the federal courts have thus become familiar with the practices in the trucking industry, a clear pattern has emerged: throughout much of the industry, trucking companies, and the unions representing drivers, have erected barriers to the movement of non-white/non-Anglo workers from pick-up and delivery jobs to the coveted road driver positions. The employment practices attacked in this suit—the no-transfer and seniority policies—are prevalent in the trucking industry. Typically, city drivers are not permitted to transfer to line driver jobs. Where they are, they are not generally permitted to carry over their seniority for job bidding and lay off purposes. The result is, at the very least, a strong disincentive for city drivers to transfer to the road. City drivers are thus effectively "locked in" their city driving jobs with no realistic possibility of transferring to line driving positions. Were there no more to the scenario, of course, the federal courts would likely have no concern; there is nothing per se illegal in no-transfer or separate seniority policies. But, as the courts have noted with some frequency, the policies often operate to perpetuate the effects of hiring discrimination. The overall result is a situation where in many areas of the country blacks and Mexican-Americans serve as city drivers, while road-driver fleets in private trucking firms, at least until very recently, have been virtually all-white/Anglo.[16] Thus it is that facially neutral no-transfer and seniority policies have come under a broad attack, for "[i]t is now beyond cavil that Title VII of the Civil Rights Act of 1964 proscribes employment practices and procedures which, although presently neutral and non-discriminatory on their face, tend to preserve or continue the effects of past discriminatory practices". United States v. N. L. Industries, Inc., 8 Cir. 1973, 479 F.2d 354, 360. See Griggs v. Duke Power Co., 1971, 401 U.S. 424, 430, 91 S.Ct. 849, 28 L.Ed.2d 158; Pettway v. American Cast Iron Pipe Co., 5 Cir. 1974, 494 F.2d 211, 236; Local 189, United Papermakers & Paperworkers v. United States, 5 Cir. 1969, 416 F.2d 980, 990-991, cert. denied, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100.

15. See, e. g., the cases cited in note 17 *infra*.

A. *Discrimination by East Texas Motor Freight*

We begin by examining the past hiring patterns of ETMF. See United States v. Jacksonville Terminal Co., 5 Cir. 1971, 451 F.2d 418, 450, cert. denied, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815. Although the plaintiffs do not attack ETMF's road-driver hiring practices—and indeed stipulated that they are not now discriminatory—we must begin there. A pattern of past discriminatory hiring is essential to the plaintiffs' case. See Jones v. Lee Way

16. Two recent studies have confirmed that Negroes and Mexican-Americans have been excluded from line driving jobs. One study found that, nationally, Negroes comprised only 2.4 percent of the over-the-road drivers for private trucking firms in 1968. Firms that employed more than 100 persons had only one-percent Negro road drivers. Leone, The Underutilization of Negroes as Truck Drivers By For-Hire Motor Carriers, 22 Lab.L.J. 631, 633 (1971). Another Study, covering 329 trucking companies for the year 1970, found that Negroes comprised 2.7 percent of the companies' road drivers. In these same companies, Spanish-surnamed Americans made up only .8 percent of the road drivers. See Nelson, Equal Opportunity in Trucking: An Industry at the Crossroads (GPO 1971).

Motor Freight, Inc., 10 Cir. 1970, 431 F.2d 245, 247, cert. denied, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237.

[13, 14] A prima facie case of discrimination may be established by statistical evidence, and statistical evidence alone. "The inference [of discrimination] arises from the statistics themselves and no other evidence is required to support the inference." United States v. Hayes Interna-

tional Corp., 5 Cir. 1972, 456 F.2d 112, 120. The statistics in the instant case are overpowering. East Texas Motor Freight has stipulated that prior to the date that Rodriguez filed a charge of discrimination with the EEOC in 1970, ETMF had never employed a Negro or Mexican-American as a line driver in that portion of the State of Texas covered by the Southern Conference Area Supplemental, Agreement. By the date of trial, two and a half years later, ETMF had hired three Mexican-Americans to join its Texas road driver force of approximately 180 drivers. By trial ETMF had still not hired a Negro road driver in Texas.

These figures establish a prima facie case of past discrimination in hiring. In other trucking cases the statistics have shown a similar pattern. In Jones v. Lee Way Motor Freight, Inc., 10 Cir. 1970, 431 F.2d 245, 247, for example, the Court summarized: "[T]here were no Negro line drivers; most whites were line drivers; and all Negroes were city drivers." Similarly, in Bing v. Roadway Express, Inc., 5 Cir. 1971, 444 F.2d 687, 688, the Court noted: "All road drivers are, and always have been white; all Negro drivers are city drivers, though not all city drivers are Negro." The similarity between the employment situations in both *Bing* and *Jones* and that here is striking. In *Bing* and *Jones*, and in each of the cases cited in the

margin, the court held that the statistics were sufficiently potent to constitute a prima facie case.[17]

[15] Once the plaintiffs established a prima facie case, the burden fell to the defendants to rebut the statistics or to explain the disparity in hiring.[18] See Rowe v. General Motors Corp., 5 Cir. 1972, 457 F.2d 348, 358. Having stipulated to the statistics, the defendants cannot, of course, dispute them. But the defendants do imply that the force of the statistical disparity is countred by the plaintiffs' stipulations that ETMF's qualifications for road drivers are not discriminatory and that the plaintiffs were employed at the San Antonio, terminal without regard to race or national origin. The defendants also argue that the plaintiffs have not shown that any members of the plaintiff class were qualified as road drivers. We reject these contentions.

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17. Thornton v. East Texas Motor Freight, 6 Cir. 1974, 497 F.2d 416 (At ETMF's Memphis terminal, all of the 105 road drivers were white. Of the 131 city drivers, 43 were black.); Witherspoon v. Mercury Freight Lines, Inc., 5 Cir. 1972, 457 F.2d 496 (No black had ever worked for Mercury Freight as a long haul driver.); Hairston v. McLean Trucking Co., M.D.N.C.1973, 62 F.R.D. 642 (Of 479 over-the-road drivers at Winston-Salem terminal, nine were black.); United States v. Navajo Freight Lines, Inc., C.D.Calif.1973, 6 FEP Cases 274 (No black or Spanish-surnamed road drivers until 1970.); Sabala v. Western Gillette, Inc., S.D.Tex.1973, 362 F.Supp. 1142 (Of 29 road drivers in Houston, 28 were white/anglo; one was Mexican-American. Of 65 drivers in Houston, 42 were either black or Mexican-American.); United States v. Lee Way Motor Freight, Inc., W.D.Okla.1973, 7 EPD ¶9066 (940 road drivers were white, 14 yere black, and 12 were other than white or black.); Sagers v. Yellow Freight System, Inc., N.D.Ga.1972, 6 EPD ¶885 (In 1968 of 150 road drivers for Yellow Freight in the Southern Conference area, none were black. As of May 12, 1972, only 3.6 percent of Yellow Freight's road drivers in the Southern Conference Area were black).

18. Although the union defendants are not responsible for ETMF's hiring policies, the case against the unions, like that against ETMF, begins with the showing of past hiring discrimination that originally operated to foreclose the road driver jobs to blacks and Mexican-Americans. See p. 60, *infra*. The unions thus join ETMF in its effort to rebut the prima facie case of hiring discrimination.

[16, 17] First, only historical hiring practices are at issue here. Whatever the nature of present hiring practices,[19] they neither explain nor justify, without more, the past failure to hire minority line drivers. Without some proof presented by the defendants to the contrary, we

55

must assume that the "lily white"/Anglo nature of the ETMF road driver fleet until 1970 resulted from discriminatory hiring practices.

[18] Second, we accord no weight to the stipulation that the named plaintiffs were not discriminated against when they were hired at the San Antonio terminal as *city* drivers. It was their inability to gain a *road* driver job with ETMF at any terminal in Texas that the plaintiffs decry.

Finally, the defendants rely on language from McDonnell Douglas Corp. v. Green, 1973, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668, in which the Court said:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Nothing in this language is inconsistent with the accepted practice of federal courts' recognizing statistics as establishing a prima facie case of employment discrimination. Sagers v. Yellow Freight System, N.D.Ga.1973, 5 EPD ¶ 8885 at 5759. In *McDonnell Douglas* a black worker, laid off in a reduction-in-force, complained that he was not rehired because of his race and involvement in the civil rights movement. The Court emphasized that the "critical issue . . . concerns the order and allocation of proof in a private, [*non-class-action*] challenging employment discrimination". 411 U.S. at 800, 93 S.Ct. at 1823. (emphasis supplied). Furthermore, the Court observed in a crucial footnote that the test outlined in the text of the opinion for a prima facie case "is not necessarily applicable in every respect to differing factual situations". 411 U.S. at 802, n. 13, 93 S.Ct. at 1824.

19. We do not accord the plaintiffs' stipulation concerning present hiring practices the broad reading that the defendants do. See pp. 57-58, *infra*.

The present case differs in several significant respects from *McDonnell Douglas*. First, this is a class action. Equally important, the Supreme Court noted in *McDonnell Douglas* no history of past employment discrimination or any other factor that might have discouraged the respondent from applying for a job. Indeed, he had had a job with the company, and its refusal to rehire him after his layoff formed the gravamen of the complaint. In contrast, at the time of Rodriguez's complaint to the EEOC, ETMF had never hired a black or Mexican-American line driver in the Texas-Southern Conference area. Given these past hiring practices, "it is not unreasonable to assume that minority persons [would] . . . be reluctant to apply for employment, absent some positive assurance that if qualified, they [would] in fact be hired on a more than token basis". Carter v. Gallagher, 8 Cir. 1972, 452 F.2d 315, 331 (en banc). It would be unrealistic to require the plaintiffs to show that blacks and Mexican-Americans applied for road driver jobs they knew they could not obtain. See Bing v. Roadway Express, Inc., 485 F.2d at 451;

Jones v. Lee Way Motor Freight, Inc., 431 F.2d at 247. We note also another distinction. In *McDonnell Douglas* the respondent's qualifications were undisputed. He had held the job, and apparently served satisfactorily, before he was laid off. In the instant case, in contrast, the possibility of meeting one of the most important criteria for hiring--the road test—has been denied to the class of city drivers. Deprived of the opportunity to take a driving test, the plaintiffs could not prove they were qualified to become road drivers.

[19-22] Proof that the relevant labor pool lacks qualified minority persons may, of course, even in a class action, rebut a prima facie case of hiring discrimination. Congress did not intend that Title VII force employers to

hire unqualified applicants of *any* race or ethnic background. Griggs v. Duke Power Co., 410 U.S. at 430, 91 S.Ct. 849; Sagers v. Yellow Freight System, Inc., 5 EPD at 5758. But it was ETMF's burden to show that its history of hiring only white/Anglo line drivers resulted from a scarcity of available Negroes and Mexican-Americans qualified to serve in that position. United States v. Hayes International Corp., 456 F.2d at 120. ETMF has not met this burden.

The next steps in our analysis were clearly delineated by Judge Thornberry in *Bing*: "Once it has been established that an employer or union has discriminated in the past, then, the inquiry is twofold: (1) Does the present policy perpetuate the past discrimination? (2) Is the present policy justified by a showing of business necessity?" 444 F.2d at 690.

The conclusion is inescapable that both the no-transfer policy and the maintenance of dual seniority rosters,

one for city drivers and one for line drivers, have perpetuated ETMF's past discriminatory hiring practices. Together, they have removed all realistic opportunity for transfer. Under the no-transfer policy a city driver wishing to transfer to road status must first resign his city driver position, with no assurance that he will be hired as a line driver, and no assurance that if he fails to be hired he will be rehired as a city driver. Even if the city driver were to become a road driver, because of the separate seniority rosters he would lose his accumulated competitive-status seniority. He would have the last choice of routes and would be the first laid off. And if laid off, he would have no "bumping" rights to recover his city driver job. "In any industry loss of seniority is a critical inhibition to transfer." 451 F.2d at 453. It is no surprise, then, that when the company temporarily relaxed in 1972 its no-transfer policy and its requirement that road drivers have three years line haul experience only five ETMF city drivers in the entire Southern Conference area took, qualified for, and held the road driver job. For a city driver with a significant amount of seniority the choice must have been a difficult one indeed. The named plaintiffs testified that they were unwilling to give up their city driving seniority to transfer to road driving jobs they otherwise desired. In the strictest sense, city drivers were "locked" into city driving jobs. The discrimination that removed the possibility that a Mexican-American or Negro could obtain a line driver job when first applying to the company was thus continued and perpetuated by the no-transfer and seniority policies which prevented the city drivers from later transferring to road driver jobs.

We turn to the question whether ETMF has justified the no-transfer policy and seniority system by a showing of business necessity. The business necessity standard is strict.

> "[T]he 'business necessity' doctrine must mean more than that transfer and seniority policies serve legitimate management functions. Otherwise, all but the most blatantly discriminatory plans would be excused even if they perpetuated the effects of past discrimination. . . . Necessity connotes an irresistable demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals. . . . If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued.

United States v. Bethlehem Steel Corp., 2 Cir. 1971, 446 F.2d 652, 662, cert. denied, 404 U.S. 959. "In other words, management convenience and business necessity are not synonymous." United States v. Jacksonville Terminal Co., 451 F.2d at 451.

[23] The business necessity test essentially involves balancing the need for the challenged practice or policy against its discriminatory impact. The business purposes

57

must be "sufficiently compelling to override any racial impact"; it must "effectively and efficiently" carry out its business purpose; and there must be no acceptable alternative practice. Pettway v. American Cast Iron Pipe Co., 494 F.2d at 246; Robinson v. Lorillard Corp., 4 Cir. 1971, 444 F.2d 791, 798, cert. denied, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655.

[24] ETMF advances two justifications for its no-transfer policy. The company first contends that the no-transfer policy is necessary to protect employees, property, and the general public. ETMF conjures up visions of an unqualified driver "hurtling through space, if you

will, at 60 miles an hour with a rig of gross vehicle weight of 72,000 [pounds]".[20] While we do not underestimate the potential dangers raised by unqualified drivers, these can be effectively diminished by carefully screening transferees.[21] See Thornton v. East Texas Motor Freight, 6 Cir. 1974, 497 F.2d 416; Bing v. Roadway Express, Inc., 444 F.2d at 691. The visions invoked by ETMF argue for continued strict qualifications for road drivers, but they are not sufficient justification for the no-transfer policy. Second, ETMF argues that as a driver-salesman the city driver's contact with customers is an important element in customer relations. The implication is that if city drivers are permitted to transfer, ETMF might lose customers. We must reject this contention also. Loss of city drivers by transfer is no more harmful to the company's pick-up and delivery business than loss for any other reason. We agree with the district court in Sagers v. Yellow Freight System, Inc., 6 EPD at 5760:

> The city driver's unique functions and skills may justify treating it as a separate job classification from that of road driver; it does not constitute an overriding business justification for denying qualified city drivers the opportunity to transfer to the road driver position where the latter position was initially closed to them on the case of race.

ETMF portrays its seniority system as preferred by the majority of black and Mexican-American city drivers. The company relies on the vote taken at the membership meeting of Local 657 where a majority of the blacks and

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20. Brief for Appellee East Texas Motor Freight 33, quoting testimony of H. L. Johnson, President of ETMF.

21. ETMF has a continuous training program for road drivers, which includes on-the-job training. The training program was accelerated after the no-transfer system was temporarily modified in 1972.

Mexican-Americans rejected a proposal to merge city and road seniority rosters. "It is obviously good personnel management", argues ETMF, to honor the preference of its Mexican-American and black employees. Furthermore, the company hints, if it had acted to merge the seniority lines, it might have been subject to legal action by those blacks and Mexican-Americans who desired dual lists, contending that the merger constituted a violation of Title VII. See Graham v. Missouri-Pacific Truck Lines, S.D.Tex.1973, [C.A. 71-11-1229, Feb. 2, 1973]. Whatever the merits of this argument as it is couched by ETMF, when relief is viewed in terms other than a merger of seniority lines, such as a once-only transfer by city drivers to line jobs with seniority carryover, any force behind the contention evaporates. ETMF's explanations do not meet the question why those blacks and Mexican-Americans who have desired to transfer have not been permitted to do so and to carry over their competitive-status seniority. Nor is it explained how permitting those city drivers to carry over their seniority would hurt other city drivers or be objectionable to them.[22]

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22. ETMF might have argued that to permit city drivers to carry over their seniority to road driver jobs would have been in violation of its contract with the local unions representing the line drivers, not parties to this case. Certainly the company might have anticipated some difficulty from those quarters, for permitting carryover of seniority into road jobs would put transferees ahead of some road drivers in seniority. Neither the threat of union difficulty nor the possibility that giving transferees seniority on the road driver roster would violate ETMF's contract with the road driver locals, however, would have provided a sufficient justification for refusing to give transferees seniority. Labor unrest stemming from interference with the expectations of whites was found not to amount to a business necessity in United States v. Bethlehem Steel Corp., 2 Cir. 1971, 446 F.2d 652, Robinson v. Lorillard Corp., 4 Cir. 1971, 444 F.2d 791, 798-799 and Local 189, United Papermakers and Paperworkers, 5 Cir. 1969, 416 F.2d 989. Furthermore, difficulties caused by the fact that city and road drivers were covered by different union contracts was rejected as a business necessity in Bing v. Roadway Express, Inc., 5 Cir. 1971, 444 F.2d 687, 691, and Jones v. Lee Way Motor Freight, Inc., 10 Cir. 1970, 431 F.2d 245, 250.

[25] The company finally contends that the plaintiffs have nevertheless failed to establish liability, because they have not shown that any of the plaintiff class meets ETMF's road driver qualifications. The argument is in essence that if members of the plaintiff class of city drivers cannot qualify for road driver jobs, how can it be said that it is the no-transfer and seniority policies that lock them in city jobs? Rather, the argument continues, city drivers are locked in by their inability to qualify for the sought-after line driver jobs, and ETMF is under no obligation to permit city drivers to transfer to line driver jobs for which they are unqualified.

ETMF would have us reverse the burden of proof, placed firmly on the defendant by the plaintiffs' prima facie case of past hiring discrimination perpetuated by facially neutral practices and policies. We stated earlier that the burden rested on the defendants to show that the failure to hire minority persons as road drivers resulted from an absence of qualified minority drivers available. So too we think the burden must remain on the defendants to prove that the discrimination shown by the plaintiffs' prima facie case is not perpetuated by present policies in that no minority city drivers are now qualified to transfer to road driver jobs. To our knowledge no court has hinged a finding of liability in a trucking case on proof that the plaintiff class of city drivers contains those qualified to assume road driver responsibilities. That some of the class will be found qualified to transfer when the discriminatory restrictions are removed has been uniformly assumed. Winnowing the qualified from the unqualified has been left to the remedy stage; only those city drivers wishing to transfer who meet objective and nondiscriminatory standards of the company are, in the final analysis, entitled to relief.

We agree with this approach. It is not the failure to hire as a line driver every city driver who would like to transfer to the road that forms the gist of the complaint in cases like the one before us. It is the policies of the company which discourage and prevent transfer regardless of qualifications that are under attack. In sum, we are of the opinion that ETMF had the burden of proving that none of the plaintiff class was qualified to transfer to the road.[23] It was not the burden of members of the plaintiff class to establish their qualifications before a case of discrimination could be made.

We recognize that by a literal reading of ETMF's road driver requirements, none of the plaintiff class of city drivers could qualify for a road driver job. No present city driver has three years "*immediate* prior line haul experience". Nor, we assume, do many city drivers have three years experience on the road, gained at any time; the spate of trucking cases that have been marched through the federal courts give clear indication of the difficulty that blacks and Mexican-Americans have had nationwide obtaining road driver jobs with private trucking firms. We do not, however, accept the criteria ETMF employs in

59

determining whom to hire as road drivers. ETMF's road driver requirements must be read against the business necessity test. That standard, always stringent, requires that we scrutinize requirements of experience when that experience has been discriminatorily denied.

[26] Although requiring experience at a particular job is neutral and job-related on its face [see Developments in the Law-Employment Discrimination and Title

23. Ezra Bierle, dock foreman at ETMF's San Antonio terminal testified that from 1968 or 1969 the tractor-trailer equipment driven by city and road drivers has been essentially the same.

VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1145 (1971)], it is discriminatory to require experience as a prerequisite to employment when the experience is unavailable to minority persons. Blumrosen, Seniority and Equal Opportunity: A Glimmer of Hope, 23 Rut.L.Rev. 268, 309 (1969). We have in this Circuit approved a lower court's striking down an experience requirement as a criterion of membership in a labor union when "negroes" were prevented from gaining such experience due to the union's racial discrimination". Local 53, International Association of Heat & Frost Insulators & Asbestos Workers v. Vogler, 5 Cir. 1969, 407 F.2d 1047, 1054-1055; see also United States v. Sheet Metal Workers, Local 36, 8 Cir. 1969, 416 F.2d 123; Dobbins v. Local 212, International Brotherhood of Electrical Workers, S.D. Ohio 1968, 292 F.Supp. 413. More significantly, we held in United States v. Jacksonville Terminal Co., 451 F.2d at 453, that where blacks were prevented by racial discrimination from utilizing their skills in the railroad industry, experience as a job criterion could not properly be confined to *railroad* experience. We do not imply that all experience requirements that act to perpetuate discrimination are illegal; only that they are illegal unless justified as a business necessity. And, as we have said, ETMF has not proved that three years' immediate line-haul experience is a business necessity for transfer of its city drivers to line-haul duties.

[27] The defendants place great reliance on the plaintiffs' stipulation that "[t]he standards and qualifications of East Texas Motor Freight for its road drivers are not discriminatory". The defendants argue that, rather than conceding only that the criteria are facially neutral, the stipulation waived any argument that the road driving requirements have a disparate impact and discriminatory effect. We do not accord the stipulation such a promi-

nent position in this suit. As we have noted, ETMF's criteria for road drivers automatically exclude all members of the plaintiff class, including the named plaintiffs. No city driver now employed can have three years *immediate* prior line haul experience. And none of the named plaintiffs, at least, has three years experience road driving gained at any time. By the defendants' reading of the stipulation, therefore, the plaintiffs have disqualified themselves from the very relief they seek most urgently--transfer to road driver jobs. We cannot accept the interpretation that the plaintiffs, represented by counsel conceded by the defendants to be experienced Title VII attorneys, stipulated away their right to relief on the eve of trial.

In conclusion, the plaintiffs established an unrebutted prima facie case against ETMF of past hiring discrimination. It is manifest that the harmful effects of this past discrimination have been transported into the present through ETMF's facially neutral no-transfer and seniority policies. No compelling business necessity has been offered to justify ETMF's policies. In our view the district court's finding that ETMF did not discriminate against the named plaintiffs, or by implication the plaintiff class, is clearly erroneous. ETMF must be held to have violated 42 U.S.C. § 2000e-2[24] and 42 U.S.C. § 1981.[25]

60

B. *Discrimination by Local 657 and the Southern Conference*

The plaintiffs contend also that Local 657 and the Southern Conference of Teamsters have acted to perpetuate the discrimination against the plaintiff class of city

24. See note 1 *supra*.

25. See note 2 *supra*.

drivers by creating collective bargaining agreements that establish separate seniority rosters for road and city drivers without provision for seniority carryover for minority city drivers who desire to transfer to road jobs. Before examining the substance of this contention, we pause to outline in more detail the manner in which the collective bargaining agreement between ETMF and Local 657 came into being.

Although the collective bargaining agreement is a contract between ETMF and Local 657, it is the product of negotiation on a national and regional scale. First, there is the National Master Freight Agreement negotiated on a nationwide basis between the Trucking Employers, Inc. and the National Over-the-Road and City Cartage policy and Negotiating Committee of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The National Negotiating Committee represents the local unions; the locals give powers of attorney to permit the National Negotiating Committee to act on their behalf. Although the Master Agreement must be ratified by the locals, ratification is generally a formality. Once the agreement is accepted by a majority of the local unions, it goes into effect and binds all locals.[26] The Master Agreement covers both city and road drivers. Then there are the Supplemental Agreements. Like the Master Agreement, although Supplemental Agreements are signed and administered by each local union at each terminal, "they are negotiated on an areawide basis by Local representa-

26. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Constitution, art. XVI, § 4 (1966). "While there is a separate formal contract between each local union and [the defendant company] in effect, the National Master Freight Agreement is published in pamphlet form and accepted nationwide, with a blank in which the number of each individual local union is inserted." Sagers v. Yellow Freight System, Inc., N.D.Ga.1972, 58 F.R.D. 54, 57.

tives of employees of all unionized trucking companies in that area". United States v. Pilot Freight Carriers, Inc., M.D.N.C.1972, 54 F.R.D. 519, 521. In our case the Supplemental Agreements were negotiated by the Southern Conference of Teamsters. From these negotiations came, so far as we are now concerned, two separate agreements, one covering road drivers and one covering city drivers. The agreements provide for seniority to run from the date of entry into a particular collective bargaining unit. At the terminal level, these separate agreements are administered by union locals. In the case before us, the city drivers for ETMF in San Antonio are represented by Local 657. Local 657 is an integrated union. Since 1952 a majority of the employees working for ETMF within the jurisdiction and membership of Local 657 have been blacks and Mexican-Americans.

[28] As we mentioned earlier, it is the creation and maintenance of separate seniority rosters for road and city drivers without provision for seniority carryover by minority city drivers that forms the crux of the complaint against the union defendants. We agree with the plaintiffs that the discrimination against the black and Mexican-American city drivers that closed out the possibility of their being hired originally as road drivers was continued and reinforced by union action and inaction. For their role in continuing the effects of this discrimination the union defendants must share the blame and the liability.

We recognize that the prima facie case against ETMF for discrimination in the hiring of road drivers falls only indirectly against the union defendants. The company has always exercised full responsibility for hiring; the unions have never exercised any. We have discussed how the inability of city drivers to carry over their competitive-

status seniority formed an important link in the chain that "locked" minority drivers into city driver jobs. Of this the unions were not unaware. Local 657 concedes in its brief that the "most important thing to an employee working under a collective bargaining agreement, except perhaps for wage rates, is his seniority".[27]

[29] The plaintiffs' prima facie case of hiring discrimination, and proof that the seniority system, a creature of the collective bargaining agreement, transmitted the discrimination into the present, shifted the burden to the defendant unions to show that the present discriminatory effects were unavoidable, that is, required as a business necessity.

[30] The primary justification offered by the union defendants is that in contributing to the establishment of separate seniority rosters they were merely following the desires of the majority of their black and Mexican-American members. Once again the defendants rely on the post-trial defeat by members of Local 657 of a proposal to merge city and road driver contracts as an indication of the preferences of a majority of Mexican-American and black city drivers. As we mentioned earlier, the degree to which the vote should be taken to represent the true desires of members of the plaintiff class is uncertain. In any event, the unions perceive their responsibility too narrowly. There are established ways to eliminate the lock-in effect of separate seniority rosters without merging rosters and jeopardizing the seniority rights of those city drivers who remain in their positions. Most obviously, seniority carryover can be allowed on a one-time-only basis for qualified minority city drivers who wish to transfer to the road.

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27. Brief for Appellee Teamsters Local Union 657, at 16.

See, e. g., Thornton v. East Texas Motor Freight, supra; Bing v. Roadway Express, Inc., 485 F.2d 441; United States v. Central Motor Lines, Inc., W.D.N.C.1971, 338 F.Supp. 532. No reciprocal arrangement for road drivers would have been necessary, because they have suffered no discrimination. See United States v. Chesapeake & Ohio Ry. Co., 4 Cir. 1972, 471 F.2d 582, 593. We believe a one-time-only transfer with seniority carryover was an alternative that could have eased the discriminatory effects of the separate seniority lists without injury to any minority city driver. This reasonable alternative vitiates the business necessity defense. See United States v. St. Louis-San Francisco Railway Co., 464 F.2d 301 at 308; Robinson v. Lorillard Corp., 444 F.2d at 798.

For their role in establishing separate seniority rosters that failed to make allowance for minority city drivers who had been discriminatorily relegated to city drivers jobs, Local 657 and The Southern Conference must be held accountable. They have violated 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981. The district court's finding to the contrary is clearly erroneous.

IV.

Remedy

[31] Because the district court concluded that the defendants were not liable under Title VII or 42 U.S.C. § 1981, it never reached the question of remedy. We remand for the court's consideration of this issue. The district courts have broad remedial powers to eliminate the present effects of past discrimination, and a large measure of discretion in modeling a decree. Local 53, International Heat & Frost Insulators & Asbestos Workers v. Vogler, 407 F.2d at 1052. The discretion is not unbridled, however, and we provide the boundaries within which the decree in this case must be drawn.

A. *Transfer*

[32, 33] We have long subscribed in this circuit to the theory that those who suffer discrimination under Title VII must be permitted to take their "rightful place" when

62

job openings develop. As we said in Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d at 988:

> The Act should be construed to prohibit the *future* awarding of vacant jobs on the basis of a seniority system that "locks in" prior racial classification. White incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation.

See Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv.L.Rev. 1260 (1967). Thus, black and Mexican-American city drivers, many of whom would now be road drivers but for the discrimination of the defendants, must be given an opportunity to transfer to the road as road driving job openings develop.

ETMF need not permit unqualified plaintiffs to transfer to the road, but in determining who is qualified ETMF must use criteria that either have no disparate impact along the lines of race or national original, or that can be justified as a business necessity. We have already stated that the requirement of three years prior road haul experience must give way. Because road driving experience has been denied to blacks and Mexican-Americans as a class, and because ETMF has not justified the experience requirement as essential, it may not be confined to road driving when to do so would discriminate against members of the plaintiff

class. ETMF having failed to prove that three years' line-haul experience is a business necessity for transfer, each city driver must be considered to meet the experience requirement by showing three years of city driving on equipment similar to that used over the road.

[34, 35] The plaintiffs argue that, because not all trucking companies require three years experience, we should also reduce the number of years experience required. See, e. g., Bing v. Roadway Express, Inc., 485 F.2d 441 (1 year); Sayers v. Yellow Freight System, Inc., N.D. Ga.1973, 6 EPD ¶ 8885 (2 years). Once the requirement of *road* experience is removed, however, the experience requirement is not only *facially neutral*, it is *neutral in effect*. Thus it need not be justified as a business necessity. Congress did not intend that Title VII lead to uniform hiring practices across an industry. So long as hiring policies do not discriminate, Title VII does not require their modification.

[36] We hold, not that all minority city drivers with three years experience at city driving must be permitted to transfer, but only that they may not be excluded unless they fail to meet other qualifications that either have no disparate impact along racial or national-origin lines or that can be justified as essential for safety or efficiency. On remand the district court should monitor carefully the criteria used by ETMF to prevent minority city drivers from transferring to line driving jobs.[28]

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28. While the in-cab road test is undoubtedly a legitimate method for determining the qualifications of a driver, it may be subject to abuse unless the chances of a subjective judgment by the tester are minimized. See, e. g., United States v. Central Motor Lines, Inc., W.D.N.C.1971, 338 F.Supp. 532, 563. Moreover, a potential transferee who performs inadequately on this test should not be disqualified unless he cannot be expected to improve sufficiently given normal training.

To permit minority city drivers the opportunity to return to their "rightful place" in the road driver ranks, the plaintiff class should be divided into sub-classes, one for each terminal in the Texas-Southern Conference area where ETMF domiciles road drivers. ETMF's system of terminal-based responsibility for hiring and of domiciling road drivers only at certain terminals is not discriminatory, and we leave these practices intact. Still, we are not blind to the recognized mobility of today's minorities. See, e. g.,

Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 at 1371. We may not assume that blacks and Mexican-Americans who became city drivers at a terminal where road drivers were not domiciled would not have moved to a terminal where road drivers were domiciled had a road driver job been open to them. Therefore, those members of the class who now work in terminals where road drivers are not domiciled must be permitted to join the sub-class of their choice. In other words, they must be provided an opportunity to become road drivers at one of the terminals where ETMF domiciles road drivers. Black and Mexican-American city drivers at terminals where road drivers are domiciled should be placed in the sub-class corresponding to that terminal. We may assume that they are already at the terminal they would have chosen had road driver jobs been open to them in the past.

Within each sub-class, minority city drivers should be permitted the opportunity to transfer as jobs become vacant at that terminal. The minority city drivers should be ranked in the various sub-classes according to their "qualification dates", described below. The ranking should determine the order in which opportunities to transfer are awarded.

[37] Over objection at trial, the district court admitted evidence pertaining to the qualifications of the named plaintiffs to become road drivers. The court then found that Rodriguez, Perez, and Herrera were unqualified. In light of the fact that the company admitted by stipulation that it did not consider any of the plaintiffs for employment as road drivers, we believe that the district court's action was premature. The question with regard to the named plaintiffs was not whether they were qualified, but whether ETMF's failure to consider their applications was discriminatory. On remand, the district court should require ETMF to consider the plaintiffs for road driver positions as vacancies occur. The court should supervise carefully the standards used by ETMF to determine whether the plaintiffs are in fact qualified, and should view with particular skepticism any reliance by ETMF on disciplinary actions taken by the company after the plaintiffs initiated their actions with the EEOC.

B. *Seniority Carryover*

[38] Members of the plaintiff class who transfer to the road must be permitted to take with them seniority for job bidding and lay off purposes. The question is "how much?" In general terms, the answer is that "how much seniority the transferee deserves should be determined by the date he would have transferred but for his employer's discrimination". Bing v. Roadway Express, Inc., 485 F.2d at 450. There is no way to arrive at such a date with exactitude, however, and some method for approximation is necessary.

In *Bing* we approved a "qualification date" formulation—the date a transferee had the experience necessary to

qualify him for a road driving job. 485 F.2d at 451.[29] The *Bing* test represents a compromise between the trial court's determination in that case that seniority rights should date from when the transferees applied to become road drivers, and the remedy requested by the Government as amicus, that transferees should carry over full company seniority.

64

This Court felt, on the one hand, that the application-date formulation of the district court failed "to account for the realities of entrenched employment discrimination", 485 F.2d at 451; the company defendant's discriminatory practices discouraged city drivers from applying. On the other hand, the Government's theory of full seniority carryover would have given superseniority to those transferees who were not qualified to be road drivers before they began working for the defendant. Until they were qualified, "discrimination could not have blocked their employment as road drivers". *Id.*

The *Bing* qualification-date formulation was rejected recently by a divided panel of the Sixth Circuit. In Thornton v. East Texas Motor Freight, 6 Cir. 1974, 497 F.2d 416, a case involving the same trucking company that is a defendant in the instant case, the Court affirmed the

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29. In this case the qualification date of a member of the plaintiff class of city drivers is the date when, in the employ of ETMF, the individual first accumulated three years combined road and city driving experience gained either with ETMF or with other organizations. If the individual already possessed such experience when hired by ETMF, of course, his qualification date will be the same as his company seniority date.

Similar to *Bing*, the straight qualification-date calculation must be modified to take account of that period from October 1969 to March 1971, during which ETMF did not hire any road drivers. The seniority of any member of the plaintiff class whose qualification date falls within the period when ETMF did no hiring must date from March 1970, when ETMF resumed hiring.

district court's grant of seniority carryover dating from six months after the transferee requested transfer or filed a charge with the EEOC. Although the Court distinguished *Bing* on the grounds that more charges were filed with the EEOC in *Thornton* (thus apparently showing that "silence and futility of protest" were less the norm), the Court also criticized the *Bing* rationale: "The rationale in *Bing* was that silence might be caused by a belief in the futility of a transfer request. That may be true, but also it may be caused by no desire to transfer." 497 F.2d at 421. The Court also noted that "there is something to be said for rewarding those drivers who protest and help to bring rights to a group of employees who have been victims of discrimination". 497 F.2d 420.

We are unpersuaded by these considerations. First, we think that the best indication whether a person desired transfer to the road in the past is reflected in whether he desires transfer now, so long as we do not create special incentives or disincentives that skew the balance. The qualification-date test of *Bing*, by taking into account experience requirements on the one hand and the effects of entrenched discrimination on the other, is as neutral as any we can envision. Second, the concern showed by the *Thornton* majority for rewarding those who help to bring rights to a group of employees was adequately answered by Judge Phillips, dissenting in part: "Any such 'reward' should not be at the expense of the other victims of the discrimination. Title VII was enacted to protect *all* employees from unlawful discrimination. This is especially true where the discrimination intimidated the employees to such an extent that they felt it would be futile to request a transfer." 497 F.2d at 428. In short, we reaffirm the qualification-date formulation of Bing.[30]

C. *Back Pay*

The district court should consider the question of back pay, with particular reference to the guidelines laid down in Pettway v. American Cast Iron Pipe Co., 494 F.2d at 251-263; Johnson v. Goodyear Tire & Rubber Co., 491 F.2d at 1375-1380; and Bing v. Roadway Express, Inc., 485 F.2d at 452-455. In these cases the criteria for the award of back pay, and the method of calculation, have been thoroughly analyzed. The most difficult question remaining

65

before the district court will be the apportionment of the burden of paying any back pay awards among the three defendants. Consistent with the broad discretion awarded the district court on this question in Johnson v. Goodyear Tire & Rubber Co., 491 F.2d at 1382, we intimate no view to this question.

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30. This Circuit recently required that transferees in a trucking case similar to this one be permitted use of "full company seniority" in their new positions. Franks v. Bowman Tranportation Co., 5 Cir. 1974, 495 F.2d 398, 416. The Court emphasized, however, a critical difference between that case and *Bing*: "In [*Bing*], Roadway had a flat requirement of one year's experience for road drivers, so that the qualification date was easily calculable. To allow the use of company seniority before that date would have placed the discriminatee in a better position than he could have achieved without the discrimination. In this case, by contrast, Bowman had no rigid one-year experience requirement. It sometimes accepted OTR [over-the-road] trainees with little or no prior driving experiende." *Id.* 495 F.2d at 417 n. 17. As in *Bing*, the qualification date in the instant case is easily calculable. The three-years experience requirement has been rigidly adhered to.

V.

The Consent Decree

On June 29, 1972, the United States filed a "pattern and practice"[31] suit in the Northern District of Texas against ETMF, the Teamsters International, and the International Association of Machinists and Aerospace workers, challenging nationwide essentially the same practices at issue in the instant private class action. February 19, 1974, approximately one month before we heard oral argument in the case before us, the parties to the Government's suit entered into a consent decree. The decree covered:

> A. Such black or Spanish-surnamed city drivers, hostlers, checkers and garage employees who are domiciled at a terminal where road drivers are presently domiciled or where road drivers have been, since July 2, 1965, domiciled under either ETMF or a predecessor company.
>
> B. Such persons who are incumbent city employees employed at a non-road driving terminal who have, since July 2, 1965, indicated a desire to transfer to the road.[32]

In addition to setting some standards for hiring and establishing hiring ratios, the decree established "transfer procedures". City drivers were to be afforded 30 days "to indicate an interest in transferring to the road driver classification at the terminal in which he is employed (if that terminal has an over-the-road operation) or at a terminal within the job market, or to a terminal of his choice (if the terminal at which he is employed has no

31. See 42 U.S.C. § 2000e-6.

32. The decree also covered some named individuals.

over-the-road operation) . . ." The issue of seniority rights was left for later resolution. The decree provided also that ETMF was to furnish a total of $175,000 as back pay compensation for members of the affected class nationwide. Persons accepting a portion of this settlement were to sign a release "stating that such designated portion is accepted in full and final settlement of all claims for monetary compensation, back pay or any other type of relief against ETMF or any predecessor corporation based upon any pending litigation or other alleged discriminatory actions because of race or national origin occurring prior to the date such release is signed".

[39, 40] A judgment by consent binds the parties and those in privity with them. Seaboard Air Line Railroad Co. v. George F. McCourt Trucking, Inc., 5 Cir. 1960, 277 F.2d 593. Members of the plaintiff class in the present action were not parties to the Government's suit nor do they have interests in privity with the Government. See Williamson v. Bethlehem Steel Corp., 2 Cir. 1972, 468 F.2d 1201, 1203, cert. denied, 411 U.S. 931, 93 S.Ct. 1893, 36 L.Ed. 390; *cf.* Trbovich v. United Mine Workers of America, 1972, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686.

We hold, therefore, that the consent decree does not operate as collateral estoppel to prohibit any members of the plaintiff class from participating in relief in this case. See also IB J. Moore, Federal Practice ¶ 0.411 [1] (2d ed. 1974). Those members of the plaintiff class who accept compensation under the consent decree and sign a release, of course, are bound by the terms of the release. But no other members of the plaintiff class lose any right to relief in the instant case.

We have chosen not to accord the consent decree any great weight in our outline of the relief to be awarded by

the district court. First, the "affected class" awarded
66
relief in the consent decree does not encompass an important segment of the plaintiffs' class here—black and Mexican-American city drivers at "non-road driving" terminals in the Texas-Southern Conference area who have not "indicated a desire to transfer to the road". The Government's remedy is thus based implicitly on the theory, one we reject, that the acceptance by a black or Mexican-American of a job as a city driver at a city-only terminal, at a time when no road positions were open to him, signifies a lack of interest in a road driver position. Rather, we have taken cognizance of both the mobility of the modern work force and the reality of entrenched employment discrimination that makes a request to transfer a futile gesture. Second, private plaintiffs in class actions under Title VII and the United States in "pattern and practice" suits protect different interests: the Government protects general economic interests in addition to the rights of minorities; private plaintiffs represent only the interests of minority group members. United States v. Local No. 3, Operating Engineers, N.D.Calif.1972, 4 FEP Cases 1088, 1093. While the Government may be willing to compromise in order to gain prompt, and perhaps nationwide, relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restitution. Finally, we cannot ignore the possibility that, if we permit negotiated settlements by the Government to control the relief accorded in pending private actions against the same plaintiffs, private actions will be significantly discouraged. Such a result would have a deleterious effect on enforcement of Title VII and would not, in our opinion, be consistent with the intent of Congress.

We are not unmindful of the argument that by going beyond the relief awarded by the consent decree we may discourage defendants in "pattern and practice" suits from entering into settlements with the United States when a Title VII private class action is proceeding simultaneously against the same defendant. The court in *Local No. 3, Operating Engineers* expressed a similar concern: "If the United States cannot offer a final settlement in cases where a pattern and practice suit is proceeding simultaneously with a class action, then the Government's bargaining power will be severely reduced". 4 FEP Cases at 1093. Our worries are eased, however, as were those of the court in *Local No. 3, Operating Engineers*, by the Government's support of the broad class relief outlined in the opinion. As amicus curiae in this case, the EEOC has filed a post-argument brief arguing that "those who elect not to take under the consent decree, as well as those who are not covered by the decree, should have an opportunity to pursue vindication of their rights through this private litigation[33].

The case is reversed and remanded for proceedings consistent with this opinion.

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33. Supplemental Brief for the United States Equal Employment Opportunity Commission as Amicus Curiae 4.

APPENDIX G

United States Court of Appeals
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth
Clerk
600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

August 18, 1975

To All Counsel of Record

No. 73-2322—Patrick Resendis, et al. v. Lee Way Motor Freight, Inc., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours

Edward W. Wadsworth
Clerk

/s/ By Clare F. Sachs
Deputy Clerk

cc: Messrs. Harry A. Nass, Jr.
Ruben Montemayor

Mr. Theo F. Weiss

Messrs. Paul Scott Kelly, Jr.
Raymond F. Beagle, Jr.

Messrs. Edward W. Penshorn
Bradford F. Miller

Messrs. G. William Baab
Hal K. Gillespie
L.N.D. Wells, Jr.

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*Filed by Lee Way Motor Freight, Inc., Local Union 657 and Southern Conference of Teamsters.

APPENDIX H

United States Court of Appeals
Fifth Circuit
Office of the Clerk
Edward W. Wadsworth
Clerk
600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

August 18, 1975

To All Counsel of Record

No. 73-2254—Ernest Herrera, et al. v. Yellow Freight System, Inc., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s)* for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied. See

*Filed by Local Union 657, Yellow Freight System, Inc., and Southern Conference of Teamsters.

Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours

Edward W. Wadsworth
Clerk

By Clare F. Sachs
Deputy Clerk

cc: Messrs. Harry A. Nass, Jr.
Ruben Montemayor

Mr. Theo F. Weiss

Messrs. Paul Scott Kelly
Raymond F. Beagle, Jr.

Messrs. Edward W. Penshorn
Bradford F. Miller

Messrs. G. William Baab
Hal K. Gillespie

APPENDIX I

United States Court of Appeals
Fifth Circuit
Edward W. Wadsworth, Clerk
Office of the Clerk
600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

August 18, 1975

To All Counsel of Record

No. 73-2801—Jesse Rodriguez, et al. v. East Texas Motor Freight, et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s)* for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

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*Filed by Local Union 657, Southern Conference of Teamsters and East Texas Motor Freight.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours
Edward W. Wadsworth, Clerk
/s/ Clare F. Sachs
Deputy Clerk

cc: Mr. Jim Heidelberg
Ms. Debra Millenson
Mr. Theo. F. Weiss
Messrs. Richard C. Hotvedt
Harry A. Rissetto
Messrs. George E. Seay
William Strock
Messrs. Edward W. Penshorn
Bradford F. Miller
Messrs. G. Wm. Baab
L.N.D. Wells, Jr.
Hall Gillespie